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DISCHARGE IN BANKRUPTCY WHERE DEBT IS NOT SCHEDULED.

An honored correspondent from the State of Washington sends us an advanced copy of the opinion of Justice Hanford, of the District Court of the United States for the Northern Division of the District of Washington, in the matter of Frank Monroe, bankrupt. The controversy was over an application by the Capital Brewing Company, a creditor, to vacate an order discharging the bankrupt from his debts, the creditor alleging in its petition that it had not been listed in the schedule of creditors annexed to the petition filed by the bankrupt, and did not have notice or knowledge of the proceedings until after the time allowed for making proof of debts had elapsed. Justice Hanford held that the creditor was not bound by the discharge, but bases his decision on the following peculiar ground:

"One of the fundamental principles in the jurisprudence of this country is that no man can be deprived of any legal right by a judicial proceeding to which he is not a party, and of which he has not received lawful notice, or had actual knowledge. Upon this principle, I hold that the bankrupt in this case has not obtained a discharge from any debt which was omitted from the schedule annexed to his petition which may be due to a creditor who did not have notice or knowledge of the bankruptcy proceedings in time to have proved his claim. Creditors who have not been notified of the proceedings in the manner prescribed by the bankruptcy law are not estopped from asserting their rights by reason of mere failure on their part to be diligent in discovering the insolvency of their debtors, or their resort to a court of bankruptcy."

We cannot agree with the learned judge on this statement of the law as a general proposition. In Pattison v. Wilbur, 12 N. B. R. 193, a case decided under the old bankrupt act, it was held that a discharge in bankruptcy will bar a claim, although the residence of the creditor was incorrectly given on the schedule, and no notice was ever served on him, and he had no knowledge of the proceedings. So also, in Collier on Bankruptcy (3d Ed.), p. 189: "The failure of the creditor to prove his debt, if it is provable, does not prevent it from being released by the discharge; not even in those cases where it was omitted from the schedule of debts, and where the creditor was not served with a notice of the proceedings." See also to same effect the following authorities: Lamb v. Brown, 12 N. B. Rep. 522; Heard v. Arnold, 15 N. B. Rep. 543; Thurmond v. Andrews, 13 N. B. Rep. 157; Batchelder v. Low, 8 N. B. Rep. 571. The reason for this rule is, that under the old bankrupt act these creditors were supposed to be brought in by a general printed notice to creditors as in the case of deceased persons. It is well settled that in order to settle an estate or the title to property, debtors or claimants can be forced in on a general order of publication without actual notice or without actually scheduling or classifying their claims.

However, we agree with the decision of the court in this case, although not with the reason assigned for it. We think it clearly comes within the provisions of sec. 17a of the new bankrupt act. This section provides that the discharge shall affect all debts except those "not duly scheduled in time for proof and allowance, unless such creditor had notice of actual knowledge of the proceedings in bankruptcy." Under this provision it is evident that debts not duly scheduled in time for proof and allowance will not be barred by a discharge unless the creditor has notice or actual knowledge of the bankruptcy proceedings. But it is to be observed even under this section that if the creditor's claim is scheduled, neither notice or actual knowledge of the creditor is necessary.

NOTES OF IMPORTANT DECISIONS.

TRIAL AND PROCEDURE—FAILURE OF DEFENDANT TO TESTIFY AS RAISING AN UNFAVORABLE PRESUMPTION.—Does the failure of the defendant to testify raise an unfavorable presumption against him. In the recent case of Bastrop State Bank v. Levy, 31 South. Rep. 164, the burden of proof was on the defendant to show that he had made other deposits in a bank than his passbook

showed. The defendant attempted to discharge this burden by all possible evidence save his own. The court said:

"While he [defendant] was present in the court during the trial, and assisted his counsel in the defense, he did not take the stand at all, and permitted the case to be closed without one word from him in rebuttal of the showing of indebtedness made against him on behalf of the plaintiff. Judicial tribunals are established to administer justice between litigants, and the first and most important step to that end is the ascertainment of the truth of the controversies which come before them. It is only when the truth is ascertained that the law can be properly applied in the just settlement of disputes. Litigants owe the duty of assisting in every legitimate way in the elucidation of the truth. When a defendant can by his own testimony throw light upon matters at issue, necessary to his defense and peculiarly within his own knowledge if the facts exist, and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the facts do not exist. Board v. Trimble, 33 La. Ann. 1073; Nunez v. Bayhi, 52 La. Ann. 1719, 28 South. Rep. 349. So, too, it has been recognized that where the means of proving the negative are not within the reach of the party alleging it, but it is within the power of the opposite party, if the negative be not true, to prove it so, the law will presume the proof of the negative averment from the fact that such opposite party withholds or does not produce the proof that the negative is not true. 2 Am. & Eng. Enc. (1st Ed.) p. 652, § 4. This would seem to be one of those cases where this principle or this doctrine might safely be applied, were there need to revoke it.

MASTER AND SERVANT—LIABILITY OF RAILROAD FOR NEGLIGENCE OF SUPERINTENDENT IN LENDING PUSH CAR.—The recent case of Erie Railroad Company v. Salisbury, 50 Atl. Rep. 117, shows how far the doctrine of *respondeat superior* can be carried under favorable circumstances. A railroad company placed a push car in the hands of the foreman of a gang of men to be used in traveling upon its road for the purpose of burning waste railroad ties. The foreman loaned it to an Italian to take away some of the ties for his own use. While the Italian was running it on the railroad track, the plaintiff, by his negligence, was injured while crossing the track. The Supreme Court of New Jersey held,—five judges dissenting!—that it was the duty of the foreman to use the push car with reasonable care to prevent injury to anyone lawfully on the track and to keep it under his own supervision until it was returned to the company, and that for the performance of that duty to the public the company was bound. The failure of the foreman to perform it was the failure of the company. The court said:

"The company cannot claim immunity on the ground that its servant violated the instructions given to him, any more than it could set up in defense that an engineer had violated the express instructions given to him to ring the bell at a public crossing. The obligation to see that the duty is performed is cast upon the owner of the road. The safety of the public demands that the company shall be strictly held to its performance. If the engineer in charge of a train of cars, after he reaches his destination, should lend his train to a friend to take a run upon the road, could it be questioned that for any injury which resulted from its negligent use the company would be responsible? The relation of master and servant would not exist between the borrower and the company upon which to base its liability, but the action would rest upon the responsibility of the company for the observance of due care in the use of the train by its engineer. In Tuller v. Talbot, 23 Ill. 357. 76 Am. Dec. 695, the plaintiff was a passenger in defendant's stage coach. The driver of the coach placed the lines in the hands of a passenger, and while the passenger was driving the plaintiff was injured through his negligence. The court held the proprietor of the stage coach liable for the injury." See also Lukin v. Railroad Co., 15 Oreg. 220, 15 Pac. Rep. 641; Railroad Co. v. Derby, 14 How. 468; Sleath v. Wilson, 9 Car. & P. 607.

INSANITY—KLEPTOMANIA AS A DEFENSE TO LARCENY.—Much discussion is being indulged of late by the courts as to whether the courts should endeavor to keep up with the medical profession on the subject of insanity. We attempted to enter the arena on this question, at least as to one phase of it,—that of "uncontrollable impulses,"—in a recent issue of the Journal. See 54 Cent. L. J. 270. The question, however, has again arisen in an equally interesting form in the recent case of State v. McCullough, 87 N. W. Rep. 503, in which the Supreme Court of Iowa held that what the medical profession call kleptomania was a weakening of the will power to such an extent as to leave the afflicted one powerless to control his impulse to appropriate the personal property of others, and that it was a good defense to an indictment for larceny independent of any question of avarice or greed. It appears that defendant had been three times before convicted of larceny and like offenses. It was shown that he possessed an inordinate desire for possessing himself of articles of personal property, with no regard to any special value they might have and for many of which he could have no use. A list of the property found in his possession is set out in the record. Many of the articles were stolen by him. It is too lengthy to give *in extenso*. We enumerate sufficiently to convey an idea of the character of the accumulation: 14 silverine watches, 2 old brass watches, 2 old clocks, 25 razors, 21 pair of cuff buttons, 15 watch chains, 6 pistols, 7 combs, 34 jackknives, 9 bicycle wrenches, 4 padlocks, 7 pair of clippers,

3 bicycle saddles, 1 box old keys, 4 pair of scissors, 5 pocket mirrors, 6 mouth organs, rulers, guns, bolts, calipers, oil cans, washers, punches, pulleys, spoons, penholders, ramrods, violin strings, etc. Several expert witnesses were introduced, who testified in response to hypothetical questions; and the effect of what they said was that defendant was insane, being afflicted with that form of mental disease known as kleptomania. The court in its instructions, after telling the jury they were to acquit the defendant if they found that the acts charged were caused by mental disease which dethroned his reason and judgment with respect to those acts and inevitably forced him to their commission, added the following: "The practical question is whether avarice or insanity was the controlling force." The court held this latter clause to be error as setting off avarice and greed against insanity, as though these qualities indicated a sound mental condition.

TRIAL AND PROCEDURE—RIGHT OF COURT TO CRITICISE THE CHARACTER OR VALUE OF EXPERT TESTIMONY.—It would sometimes seem not inexcusable on the part of trial judges to become out of patience with much of the subsidized expert evidence that is offered to bamboozle a jury on intricate scientific questions. This same feeling also arises where the "experts" bandy smart words or invent new terms which a jury must either believe or fail to consider. In the recent case of State v. McCollough, 87 N. W. Rep. 503, the trial court gave the following instruction to the jury on the value of certain expert evidence as to the character of kleptomania as a phrase of insanity:

"Medical men have been called as experts by the defendant, to give an opinion as to the mental condition of the defendant at the time of the acts charged in the indictment. These opinions will be of greater or less aid to you in your deliberations, depending very much on the skill, knowledge, and experience of the witness, and his acquaintance with the subject under investigation. It will readily occur to you that this kind of evidence may be found quite reliable and satisfactory, or the reverse, and entitled to little, if any, consideration. It may further be remarked, too, in regard to evidence which is made up largely of mere theory and speculation, and which suggests mere possibilities, that it ought never to be allowed to overcome clear and well established facts. In this connection, I deem it proper to say that, while, perhaps, the profession of law has not fully kept pace with that of medicine on the subject of insanity, medical authorities have propounded doctrines respecting it as an excuse for criminal acts which a due regard for the safety of the community, and an enlightened public policy, must prevent juries from adopting as a part of the law of the land."

It was said by appellant that this was an unfair criticism of the expert testimony, and that the jury should have been allowed to consider all the evidence, and to accord to the testimony of each witness such force and effect as they deemed proper, uninfluenced by reflections from the court tending to discredit it. The court said: "We have approved an instruction telling a jury the unsatisfactory character of expert evidence relating to handwriting. Whitaker v. Parker, 42 Iowa, 585. But such evidence is of a peculiar character. One man is but little better qualified than another to give it, and the rule of the cited case cannot properly be applied to all opinion testimony. The value of opinion evidence of this nature is generally for the jury alone. Rog. Expert Ev. § 41. Usually the court must not, in its instructions, underrate or detract from the weight of such opinions. Eggers v. Eggers, 57 Ind. 461; Cuneo v. Bessoni, 63 Ind. 524; Weston v. Brown (Neb.), 46 N. W. Rep. 826. Practically the whole defense in this case rested upon the opinions of experts. They were men of a high degree of skill and long experience in treating mental ailments. The entire subject is peculiarly technical and unfamiliar to the common mind. While the jury were to pass upon the weight of the opinions in the light of all the facts, they should have been permitted to take such opinions fairly, and consider them without detraction by the court. See Brush v. Smith, 111 Iowa, 217, 82 N. W. Rep. 467. It is true that in State v. Hockett, 70 Iowa, 446, 30 N. W. Rep. 742, an instruction identical in language with the one under consideration was approved, but we think that case can be distinguished from this; and inasmuch as this court, as now constituted, would not approve the reasoning there employed if the question were a new one, we are not inclined to apply the rule announced to any save a similar state of facts."

WHAT CONSTITUTES THE PUBLIC TO JUSTIFY A TAKING OF PROPERTY UNDER THE RIGHT OF EMINENT DOMAIN.

The eminent domain includes the right to take and receive any property within the jurisdiction of the sovereignty for a public purpose, use or benefit, with the means of enforcing the right upon compensating the owner. The purpose of this article is to determine of what elements the entity for the use, benefit or purposes of which the property is taken. To ascertain of what proportion of the population of the state the public is composed, over what area and under what conditions the benefits must be distributed to have it considered that the public is the recipient. These benefits are clearly distinguishable and divisible into classes which may be denominated direct or indi-

rect. By direct benefits are intended those advantages which are general and common within the area affected, and in which all within the district participate in essentially the same degree. By indirect advantages we mean those things from which a single individual or associated set of individuals derive benefit immediately while incidentally the public welfare is increased. A few cases will show the distinction yet more clearly, notably the private road, railroad and drainage cases are illustrations of the indirect advantages, while the school house yard, irrigation and the like cases illustrate the class of direct benefits.

Indirect Public Benefits.—The cases of indirect advantage will be considered first, and here will be included all cases where private interests are principally advantaged, and where the general good is merely incidental. The theory upon which the sovereign function is exercised in these cases is that the enterprise is of such great public importance that from the standpoint of the state it is the immediate incidental advantage to the community and not the particular individual advantage that is worthy of consideration. Two classes of indirect public advantage may also be observed. One of these may be called the palpable indirect public benefit, by which is intended an advantage to the public which is evident tangible and in excess of what falls to the lot of the individual. In the other class are placed benefits which appropriately bear the name of impalpable public benefits, and which, generally speaking, include public advantages which are remote, contingent, speculative, and dependent upon the success of the individual enterprise chiefly promoted, for their materialization. These are also present in cases where society at large or some portion of it is the principal beneficiary, but are rarely considered to warrant the exercise of the right of eminent domain; a case in which it was said that although private property conduces to public benefit the drainage of a farm and enable the owner to raise larger crops, is not a purpose for which land may be taken,[1] very clearly illustrates the proposition. The viewpoint from which these cases of indirect palpable public benefit must be considered should show the relation between the recipient of the indirect benefit and the state, the purpose being to ascertain in what the beneficiary consists, since it is evident that so far as the law of eminent domain is concerned this constitutes the public. To attain the object sought here this scope of the direct individual advantage need not be considered, it is only what is denominated the indirect public advantage that merits discussion as at the point of its incidence we shall necessarily find the public, and when the elements of this beneficiary the recipient of this indirect advantage have been determined the object of our essay will have been accomplished, we will have the answer to our topical question, unless, perchance, the scope of the direct benefits to be considered subsequently afford a different answer.

Same Subject—Private Road Cases.—The first instance which will be considered under this class are those cases where it has been endeavored to condemn a right of way for the principal and exclusive use of an individual. Until quite recent years the courts have generally denied the propriety of these efforts to take private property *in invitum*,[2] until in some cases the constitution has been altered to allow the proceedings.[3] The theory upon which these adjudications have been made is that the taking was for private use and transferred the property of one individual to another.[4] Two subsequent decisions have applied a theory more consistent with the logic of the situation and the philosophy of the law in this field. In these cases a right of way from a highway to a private holding was condemned, and the courts adjudged the public use to consist in the opportunity afforded all who wished to visit the premises reached by the roadway to do so.[5] On the other hand, it has been held improper to take land for a roadway to connect two separate holdings of the same individual where the use was necessarily exclusively his,[6] and where it was said to be proper to condemn for a road connecting private property with a highway, the court held proceedings *in invitum* for a right of

[1] McQuillen v. Hatton, 42 Ohio St. 202, 204 (1884).

[2] Cooley's Const. Lim. p. 652, and cases cited.

[3] *Id.* 653, note.

[4] Osborne v. Hart, 24 Wis. 89, 91 (1869).

[5] Latah County v. Peterson, (*Id.*) 29 Pac. Rep. 1089, 16 L. R. A. (1892); Los Angeles County v. Reyers (Cal.), 32 Pac. Rep. 233 (1893).

[6] Snow v. Sandgate, 66 Vt. 451, 21 Atl. Rep. 673.

way between a mine and a canal, unlawful as it was, merely for private use.[7] The public, then, so far as these cases go, lies between the extremes of the single individual or associated entity of persons as a minimum and the whole range of society, at least so much of it as will be as probable to use the private road as the maximum.

Same Subject—Railroad Cases.—Akin to the private road cases, although broader in their scope, are the cases wherein railway corporations have exercised the right of eminent domain to give them a right of way and other property necessary to the prosecution of their transportation enterprise. It has been generally held that the construction of public lines of railway, that is, lines open for transporting on behalf of all, is a public use.[8] But if the road is for the exclusive use of a few private owners as a siding to a factory for its use and that of the railroad company alone,[9] or is a street railway to be used exclusively in transporting the private freight of its owner,[10] there is no warrant for taking property *in invitum* for it. One other case logically in this field may not be passed without mention, in this, an attempt was made to take property for a railroad to enable tourists at Niagara Falls to get a better view of a portion of the phenomena there presented, but the courts held this was not a public purpose, and refused to allow the condemnation.[11] These cases do not allow us to materially narrow the view of the term public which was indulged at the close of the private road cases, in fact they broaden it if anything, for probably more would wish to use the Whirlpool railway at Niagara Falls than would ever care to travel a private road.

Same Subject—Drain Cases.—Another set of illustrations of the incidental public benefit may be found in attempts to condemn for ditches and dikes; these cases are considered also under the subject of direct benefits, but they are also useful here. Drains are considered public uses where they concern the general health, but if they merely advantage the individual they are not esteemed to warrant taking property *in invitum*; thus, while the draining of a marsh, improving the health of the community, warrants the taking,[12] but a private owner may not put a tiled drain from his land through that of his neighbor.[13] It is evident that if the probabilities are considered there has been a slight restriction of the limits of the public in these cases, for the draining of marsh would certainly, under ordinary conditions, be conducive to health over a much narrower area than that covered by the benefits arising from the presence of the railway, and may be likened in scope to the public advantages of a private road.

Same Subject—Public Water and Gas Companies.—We are here to consider a somewhat more narrowly restricted exponent of the public uses in which the incidental benefits are confined within the limits of municipal corporations. Thus, a company organized for the purpose of supplying water for public use in a village,[14] or a natural gas company designing to supply gas for public consumption,[15] may exercise the right of eminent domain, so where the main benefit is to the companies principally concerned the incidental benefits to the public municipal corporations supplied with water or gas are deemed benefits to the public.

Opposed to these in principle is the declaration that incidental benefit to a city where the main benefit is to an individual will not set in motion the power under discussion.[16] As this case is opposed to the great weight of authority and practice, it may be scarcely esteemed a variation of the general rule permitting such companies to take property *in invitum*.[17]

Same Subject—Irrigation Cases.—A similar situation is presented where it is attempted to condemn a right of way for an ir-

[7] Waddell's Appeal, 84 Pa. St. 90, 94 (1877).

[8] Concord R. Co. v. Greeley, 17 N. H. 47 (1845); Bradley v. New York, etc. R. Co., 21 Conn. 294 (1851); Swan v. Williams, 2 Mich. 427 (1852).

[9] Pittsburgh, etc. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. Rep. 454, 2 L. R. A. 680 (1889). But see Chicago, etc. R. Co. v. Porter, 43 Minn. 527, 46 N. W. Rep. 75, 43 Am. & Eng. R. Cas. 570 (1890).

[10] Fanning v. Osborne, 102 N. Y. 441 (1886).

[11] *Re* Niagara Falls, etc. R. Co., 108 N. Y. 375 (1888).

[12] Hartwell v. Armstrong, 19 Barb. (N. Y.) 166, 168 (1854).

[13] Fleming v. Hull, 73 Iowa, 598, 602, 35 N. W. Rep. 673 (1887).

[14] *Re* Malone Water Co. (N. Y. Sup. Ct.), 38 N. Y. St. Rep. 95, 15 N. Y. Supp. 649 (1890).

[15] Johnston v. People's Natural Gas Co. (Pa.), 5 Cent. Rep. 564.

[16] Stratford v. Greensboro, 124 N. Car. 127, 32 S. E. Rep. 394 (1899).

[17] Cook's Corporation Law (3d Ed.), sec. 932.

rigation ditch, and here the supply of water to a farming neighborhood is esteemed a public use, although it is said that it would not be if the land was all owned by a single individual;[18] so also furnishing water to a community of thirteen persons warrants the exercise of the prerogative right.[19] This narrows our definition of the public within quite restricted limits. Under these decisions advantage to a city, a village, a farming neighborhood, or even to a community of thirteen persons, calls this power into operation; in other words, constitutes the public.

Direct Public Advantages. — When the public advantage is esteemed the main object for calling the power to take private property into operation, there may also be a field of benefit without the scope of the direct advantage, as was suggested earlier in the discussion; this, however, is not generally an additional reason for the taking, the argument being based alone on the welfare of the district immediately benefited.

Same Subject—The School House Cases.— In these, land was condemned for school houses and yard,[20] and in the Vermont case it was argued that the use was too restricted and local to be considered public, and in reply to this Poland, J., said: "That every public use is to some extent local and benefits a particular section more than others. Railroads and canals, the most extensive of our public works, do so in some degree. Burying grounds, aqueducts, mills and many highways are as purely local as this, and no person can derive benefit from them except by becoming a resident in their vicinity. In the same way this use may be for the benefit of any citizen. * * * The cases on this subject do not warrant the assumption that the use must be universal and one that may be participated in by all."

Same Subject—The Drainage Cases.— This general topic, already considered with the cases of indirect benefits, demands further attention here. As was said there the draining of a single holding was not a public purpose.[21] So also a statute authorizing a drainage corporation composed of three persons to exercise the right of eminent domain has been declared invalid,[22] but lowering a dam relieving a large tract in several towns from water was deemed a public purpose, although the court remarked that the holding would have been otherwise had a small territory or a few individuals been benefited.[23] One other case demands attention here in this it was held that diking or draining a considerable tract about a bay owned by private parties which the public could not use was an individual enterprise.[24] Perhaps we may not oppose this particular holding, but a theory contained in a remark in the opinion is little too sweeping. The statement is that the number of private owners is immaterial, as the principle is the same whether three or three hundred are benefited. The argument is that the advantage must be common. It is clear that individuals make up the public, and if this be true then advantage to these same individuals will benefit the public which they compose. That the number involved, down to a certain point, does not make the public may be conceded, but the conclusion that whether the benefit is public or not is directly dependent upon the number benefited as well as upon the manner of its enjoyment may not be escaped. It is true that the use must be common,[25] and that it may not be restricted by other than regulations proper as a reasonable exercise of other functions of government, and it may be that the purpose will be private, not because too few are benefited, but because the benefit is not in common, although it is quite possible that the difficulty here would be traceable to the paucity of numbers directly or indirectly involved. But this is a little beside the subject and the attention will now be turned to the question of whether the benefit must be common to public corporations.

Whether the Public Exists Apart From a

[18] Lindsay Irrig. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802 (1893).

[19] Oury v. Goodwin (Ariz.), 26 Pac. Rep. 376 (1891).

[20] Williams v. School Dist. No. 6, 33 Vt. 271, 279 (1860); Board of Education v. Hackman, 48 Mo. 243, 245 (1871).

[21] Fleming v. Hull, 73 Iowa, 698, 35 N. W. Rep. 673 (1887).

[22] Jenal v. Green Island Draining Co., 12 Neb. 163 (1881).

[23] Talbot v. Hudson, 82 Mass. (16 Gray) 417, 424 (1860).

[24] Coster v. Tide Water Co., 18 N. J. Eq. 54 (1866).

[25] Coster v. Tide Water Co., 18 N. J. Eq. 54 (1866); O'Reilly v. Kankakee Valley Draining Co., 32 Ind. 169, 184 (1869); *Re* Burns, 155 N. Y. 23, 27 (1898); Pocantico W. W. Co. v. Bird, 130 N. Y. 249.

Corporate Body.—Mr. J. B. Thayer, writing in the Law Reporter in 1856,[26] questions the propriety of taking property for the benefit of a community lesser in degree than the ultimate political division of the state as a small portion of a town or village. At this time, almost fifty years subsequent to the publication of this article, we will find it opposed to one decision and the unspoken theory upon which many cases are based. In the case specially mentioned it was held that protecting a populous district from inundation warranted the taking of land to straighten a river, although the district was not a body corporate;[27] hence, while we may agree with Mr. Thayer's conclusion that a benefit affecting even a small portion of the state is public, we cannot follow his reasoning that this portion must at least be one of the ultimate political corporations of the commonwealth.

Cases Enunciating General Propositions.—The courts have been very liberal in several cases in admitting what constitutes the public. They have declared that benefits confined to a particular community without benefiting the whole state,[28] or restricted to a specific district benefiting but few,[29] or limited to a small locality,[30] may be public, that it is not essential that the entire or a considerable portion of the community be benefited by the enterprise in aid of which the soverign right is invoked.[31] To this end, therefore, the argument from all the cases, both of direct and indirect benefit, seems irristible, that not even in theory is all society, nor the entire state, nor the whole commonwealth, nor its included public corporations intended by the term public. Yet more restricted are the boundaries which include the elements of the body politic the constituents of the public; these are in the school district, the farming neighborhood, even in the community of thirteen.

COLIN P. CAMPBELL, LL. M.
Grand Rapids, Mich.

[26] 19 Law Rep. 253.
[27] Green v. Swift, 47 Cal. 536, 539 (1874).
[28] *Re* Bloomfield Gas Co., 63 Barb. (N. Y.) 437, 448 (1872).
[29] Hartwell v. Armstrong, 19 Barb. (N. Y.) 166, 168 (1854).
[30] Coster v. Tide Water Co., 18 N. J. Eq. 54, 68 (1866); O'Reilly v. Kankakee Valley Draining Co., 32 Ind. 169 (1869).
[31] Riche v. Bar Harbor Water Co., 75 Me. 91, 96 (1883); Aldridge v. Tuscambia R. Co., 2 Stew. & P. (Ala.) 199, 211.

MASTER AND SERVANT—FELLOW SERVANTS—INJURIES—ASSUMED RISK.

WISKIE v. MONTELLO GRANITE CO.

Supreme Court of Wisconsin, October, 15, 1901.

1. A foreman, who, in operating a quarry, conducts the blasting with the assistance of the other employees, is a fellow servant with them, precluding recovery against the company for an injury to an employee alleged to have been occasioned by the foreman's negligence in the preparation of a blast.

2. An employee who has worked with another in a quarry for 14 years in blasting assumes the risk precluding recovery for an injury alleged to have been occasioned by such other's negligence in improperly preparing a blast.

CASSODAY, C. J.: The gist of the complaint is that the defendant negligently failed to furnish to the plaintiff quarry company a reasonably safe place in which to work, and to keep and maintain the same in a reasonably safe condition. This is made plain by the allegations, therein to the effect that Pender, the foreman, improperly prepared a blast which he knew, or ought to have known, had not wholly exploded; that that made it his duty to renew the blast, as stated in the expert testimony; that he negligently failed to do so, and then negligently and carelessly set the plaintiff to work on the rock to remove and separate the same from the main body by glutting, as indicated in the testimony. In other words, the negligence complained of is the negligence of Pender, who, with the assistance of the plaintiff, prepared the blast. Pender and the plaintiff had together worked in that quarry for 14 years prior to the accident. During that time Pender had had charge of the men, and personally conducted the blasting. In doing so he was assisted by others, including the plaintiff. Such blasting occurred two, three, or four times a week, and sometimes two, three, or four times a day. Never before the occasion in question had a blast failed to fully explode. There is no pretense of any negligence on the part of the defendant, except in what Pender so did and so omitted to do on the occasion in question. The question recurs whether the plaintiff can recover from the defendant by reason of such negligence on the part of Pender. The defendant contends that there can be no recovery, by reason of the fact that the plaintiff and Pender were co-employees in the work of such blasting. The plaintiff contends that they were not co-employees. All must agree that at common law the master is not responsible for injury to a servant, caused wholly by the negligence of a fellow-servant. Courts differ widely, however, as to who constitutes such fellow-servants. In this state, and most of the other states, it is firmly settled that it does not depend upon the grade or rank of the servants

whose negligence caused the injury, but upon the nature of the service being performed by them and in which the negligence occurs. Dwyer v. Express Co., 82 Wis. 307, 52 N. W. Rep. 305, 33 Am. St. Rep. 44, and cases there cited; Kliegel v. Manufacturing Co., 84 Wis. 148, 53 N. W. Rep. 1119; Stutz v. Armour, 84 Wis. 623, 54 N. W. Rep. 1000; Hartford v. Railroad Co., 91 Wis. 374, 379, 64 N. W. Rep. 1036; Prybilski v. Railway Co., 98 Wis. 413, 74 N. W. Rep. 117; Dahlke v. Steel Co., 100 Wis. 431, 76 N. W. Rep. 362; Portance v. Coal Co., 101 Wis. 574, 77 N. W. Rep. 875, 70 Am. St. Rep. 932; Adams v. Snow, 106 Wis. 152, 81 N. W. Rep. 983; Meilke v. Railroad Co., 103 Wis. 1, 5, 6, 79 N. W. Rep. 22, 74 Am. St. Rep. 834; Liermann v. Dry-Dock Co. (Wis.), 86 N. W. Rep. 182. For earlier cases in this court, see Toner v. Railway Co., 69 Wis. 197, 198, 31 N. W. Rep. 104, 33 N. W. Rep. 433. The rule stated is mentioned in a standard work as the "approved doctrine," and the authorities cited from most of the states and the English courts justify the statement. 12 Am. & Eng. Enc. Law (2d Ed.), 933-942. The Supreme Court of the United States has repeatedly affirmed the rule mentioned, especially during the last few years. Railroad Co. v. Baugh, 149 U. S. 368, 379, 390, 13 Sup. Ct. Rep. 914, 37 L. Ed. 772; Railroad Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. Rep. 269, 40 L. Ed. 418; Railroad Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. Rep. 843, 40 L. Ed. 994; Same v. Charless, 162 U. S. 359, 16 Sup. Ct. Rep. 848, 40 L. Ed. 999; Martin v. Railroad Co., 166 U. S. 399, 17 Sup. Ct. Rep. 603, 41 L. Ed. 1051; Railroad Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. Rep. 85, 44 L. Ed. 181. See, also, Stevens v. Chamberlain, 51 L. R. A. 513, and note, 40 C. C. A. 421, 100 Fed. Rep. 378. These cases overrule the Ross case, 112 U. S. 377, 5 Sup. Ct. Rep. 184, 28 L. Ed. 787, and disapprove the rule in force in Ohio and some other states. In most of the cases cited the foreman or manager of the work was the person guilty of the negligence complained of. Thus the Supreme Court of the United States has expressly held that: "A common day laborer in the employ of a railroad company, who, while working for the company, under the order and direction of a section boss or foreman, on a culvert on the line of the company's road, received an injury by and through the negligence of the conductor and the engineer in moving and operating a passenger train upon the company's road, is a fellow-servant with such engineer and such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted." Railroad Co. v. Hambly, 154 U. S. 349, 355, 356, 14 Sup. Ct. Rep. 983, 38 L. Ed. 1009. In that case Mr. Justice Brown, speaking for the court, states the rule as indicated, and cites cases in support of it from 15 states, including Wisconsin. He also cites cases holding the contrary doctrine. That case is quite similar in its facts and ruling to Cooper v. Railway Co., 23 Wis. 668, and Toner v. Railway Co., 69 Wis. 197-199, 31 N. W. Rep. 104, 33 N. W. Rep. 433. So in a more recent case the Supreme Court of the United States has held that: "Where the business of a mining corporation is under the control of a general manager, and is divided into three departments, of which the mining department is one, each with a superintendent under the general manager, and in the mining department are several gangs of workmen, the foreman of one of these gangs, whether he has or has not authority to engage or discharge the men under him, is a fellow-servant with them; and the corporation is not liable to one of them for an injury caused by the foreman's negligence in managing the machinery or in giving orders to the men." Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. Rep. 40, 42 L. Ed. 390. Counsel cite Promer v. Railway Co., 90 Wis. 215, 63 N. W. Rep. 90, 48 Am. St. Rep. 905, in support of their contention that the defendant is responsible for the negligence of Pender. But that case has recently been limited to the proper selection and instruction of a sufficient number of competent servants to properly do the work. Portance v. Coal Co., 101 Wis. 579, 77 N. W. Rep. 875, 70 Am. St. Rep. 932. Counsel insist that this case is ruled by McMahon v. Mining Co., 95 Wis. 308, 70 N. W. Rep. 478, 60 Am. St. Rep. 117. In our judgment, that case is clearly distinguishable from the case at bar. In the statement of the case it is said: "The gist of the complaint is that the plaintiff was set to work by a shift boss in a certain part of the mine where there were concealed unexploded blasts known to the shift boss, but not to the plaintiff; and that plaintiff, in ignorance of the danger, while drilling and preparing for a blast, was injured by the explosion of one of the concealed blasts." It was further stated, in effect, that the shift boss, Thomas Cadden, testified that July 1, 1894, he loaded six holes in the forehead of a certain drift with dynamite, and endeavored to explode the same by electricity; that there were three holes that had wires sticking out of them after the blast had been fired; that no further work was done at that place in the mine until July 17, 1894, at which time the shift boss placed the plaintiff and one Hugh Cadden at work at the forehead in question. McMahon himself testified that he commenced work in the mine June 19, 1894; that he first worked back towards the shaft from the forehead, the further end of the diggings,—from the west to the east, between the shaft and the forehead; that he worked at that place near the shaft about two weeks; that after they had moved down about 100 feet away, and worked there probably a week, and that July 17th they started to work up in the forehead,—right at the forehead; that there had not been anybody working in that forehead just before for a while,—not for a couple of weeks he should judge. That was the place where the explosion occurred which injured McMahon. It is very obvious that McMahon was not at work at that place July 1st, when the partial explosion took

place, nor at any time until he was put at work there by the shift boss July 17, 1894; and consequently he was put in a new place to work, which the shift boss knew to be dangerous, but of which he was ignorant. The admitted facts in the case at bar are different. We must hold that the plaintiff in this case was a fellow-servant with the foreman, and hence that defendant is not responsible for the negligence of Pender. Besides, the plaintiff and Pender had worked together in the quarry for 14 years in the same kind of service, and having the same relation to each other, and hence we must hold that the plaintiff assumed the risk. This view is supported by the authorities cited. See, also, Paule v. Mining Co., 80 Wis. 350, 50 N. W. Rep. 189; Showalter v. Fairbanks, Morse & Co., 88 Wis. 381, 60 N. W. Rep. 257; Dougherty v. Steel Co., 88 Wis. 343, 60 N. W. Rep. 274; Mielke v. Railroad Co., 103 Wis. 1, 79 N. W. Rep. 22, 74 Am. St. Rep. 834.

The judgment of the circuit court is affirmed.

NOTE.—*The Basis on Reason and Principle for a Limitation of the Fellow Servant Doctrine.*—The question propounded as the subject of this annotation has been one which has perplexed the courts to an extent few other questions have done. The whole subject of fellow servant is a new one finding its first competent judicial expression in the splended argument of Chief Justice Shaw, in the case of Farwell v. Railroad Corporation, 4 Met. (Mass.) 49, 38 Am. Dec. 339. The rule is, simply stated, that a master is not answerable to one servant for an injury caused by the negligence or tortious acts of another servant, while both are engaged in the same service. The controversy as to who are fellow servants would have been unimportant, however, if it had not been for a subsequent decision of an Ohio court which injected a new element into the discussion in its endeavor to lay down a rule to test the limit of the master's exemption under this doctrine. In the case of Little Miami Railroad Co. v. Stevens, 20 Ohio, 416, the court held that where an employer placed one person in his employ under the direction of another, also in his employ, such employer is liable for injury to the person of him placed in the subordinate situation, by the negligence of his superior. In this case the engineer of a train was placed under the orders of the conductor, by whose negligence he was injured. It was held that since the conductor represented the corporation, the latter was liable. This doctrine was subsequently affirmed by later cases in Ohio which marked an unequivocal distinction in favor of the liability of the master in cases of subordinate servants injured by the negligence of superior servants. Wherever one servant is placed under the orders of another servant the master is liable, no matter whether or not the superior servant is performing the same duties as the subordinate, and not those strictly pertaining to his position as a superior. Berea Stone Co. v. Kraft, 31 Ohio St. 287. This is the rule in Ohio. There is no more difficulty under such a rule than there is in those states which reject the whole doctrine. But in those states which are halting between these two opinions there is great diversity of opinion. And, moreover, even in those states which reject the doctrine of superior servants, and yet hold to the doctrine of vice principals, an equally difficult problem arises in distinguishing between vice principals and merely superior servants.

Much unnecessary effort in text books and encyclopedias of the law has been wasted in attempting to reconcile the cases on this question or to group them under five or six different general rules denominated by the name of the states which first announced them. Many illogical refinements and absurd classifications of the subject have been insisted upon which have done more to obscure both courts and lawyers than to enlighten them as to the right principles underlying the entire subject matter. Rather than to make the attempt, therefore, to classify or reconcile the multitudinous decisions on this subject of which every state has its share, it would probably be more profitable to consider the question as *res nova*, dissociated from the mass of fine distinctions announced by the different state courts, and to reach a right conclusion upon principle. Let it be distinctly understood, however, that all courts unite in placing some limit to the exemption of the master under the fellow servant doctrine, and that this limitation is various, ranging from that of the superior servant doctrine to that of the vice-principal rule.

Various reasons have been assigned as the basis of the fellow-servant doctrine, many of them based upon policy rather than upon principle. This must be borne in mind, that the master is only responsible to the servant for his own negligence. He is certainly not liable to the servant for what a stranger coming upon the premises, uninvited by the master, might do to him or cause to happen to him. In the last analysis, by some method of reasoning, the negligence or tort which caused the injury to the servant must be brought home to the master as his act of negligence or as his tort. The master is liable to the servant for his own negligence, but for nothing else. All other dangers and accidents of the business which cannot justly be charged to the master's negligence are risks assumed by both master and servant in entering upon the relation. The master is not like the carrier in relation to goods and passengers, an insurer of the safety of his employees. His liability is regulated by no more stringent rule than that applicable to ordinary cases of negligence. The fellow-servant doctrine can, therefore, not be considered even an exemption or an exception to the rule. The law never did, and never could, on principle, attach any liability to the master for the negligence of a fellow servant independent of any negligence on the master's part in the selection of an incompetent servant, any more than he can be held liable for defective machinery, where he has used due care in its selection, and the defects are latent and not discoverable by either master or servant. For these things the master is not chargeable with negligence. A question of policy also backs up the rule if it needed any other backing. A servant can watch and control the acts of a fellow-servant to better advantage than the master, and it is always most expedient to throw the risk upon him who can best guard against it. We have not overlooked the rule of *respondeat superior* which renders a master liable for the acts of his servant committed within the scope of his employment. This rule, however, presumes the identity of the master with the servant, it presupposes that the parties to the negligent act stand to each other in the relation of strangers between whom there is no privity. Thus, all the servants of one master while acting within the scope of their employment are identified with the master in all their actions affecting third persons. But among themselves they, of course, do not stand in this relation unless one of them, in a more peculiar

sense, represents the master as to them. Fellow-servants in the same employment, therefore, do not represent the master as to each other and for injuries resulting from each other's negligence cannot hold the master. This, as we said before, is not because they constitute any exemption or exception to the rule, but merely because the rule in terms could never apply to them. Thus, Chief Justice Shaw said in the leading case of Farwell v. Railroad Corporation, *supra:* "The master is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself."

We have therefore reached the conclusion that a master is liable for his own negligence or for the negligence of those who, in contemplation of law, are presumed to represent him to the person injured. To what extent the doctrine of fellow-servant is limited, or to put the question more accurately, how far the master is identified, and, therefore, chargeable with the negligence of one of his servants, so that the latter is presumed to represent him and his authority in his relation with the other servants, is the real point of difficulty. All jurisdictions recognize that the master is liable for the acts of one who represents him or stands in his stead in relation to the servant, and, in reality, it makes little difference whether you call him a vice-principal or a superior servant. There is no need, as some text-writers have done, to stretch the importance of these terms as denominating different rules. Indeed, some cases in which the courts have used the term superior servant, and have been, therefore, classed under what is known as the superior servant rule, in reality were cases of vice-principals, and perfectly justified under the preponderance of authority. As to the terms themselves, a vice principal is one who is acting in a particular transaction in the name and stead of the master, and may or may not be a superior servant; a superior servant is one who nominally, and by position, is of higher rank and authority than the other servants, and may or may not be a vice-principal. It is not in what you call the servant, but what he is, that renders the master liable. It may be truthfully affirmed, therefore, that there is no disagreement between the courts on the theory of the law as applicable to such cases, although the language used in the opinions is sometimes very vague and confusing. They all recognize that to hold the master liable the servant causing the injury must be his representative. Their great point of difference, however, is as to the test to be applied. When is a servant presumed to represent the master so as to hold the latter liable for the former's negligence? Ohio courts take one extreme and apply a very simple, but somewhat faulty test,—*i. e.*, that, "where an employer places one person in his employ under the direction of another, also in his employ, such employer is liable for injury to the person of him placed in the subordinate situation by the negligence of his superior." Little Miami R. R. v. Stevens, 20 Ohio. 416. The criticism which has been heaped upon this rule has not altogether been justified, as results have been attained under it that could not have been otherwise, under the stricter and more careful tests of other states. This results from the fact that a vice-principal will, in most cases, be a superior servant. Many other states have adopted this test in a little modified form which is that while the master is not liable for the negligence of every servant of higher rank than that of the injured servant, he is liable for the negligence of a superior servant, acting within the scope of his employment, who has control over the injured servant, with authority to employ and discharge him. Douglass v. Railroad, 63 Tex. 561. In other states the negligence of the superior servant must result from the exercise of authority delegated to him directly from the master or by virtue of his position. As where he gives a negligent order, which, under the rules of the master, the servant must obey. Chicago R. R. v. Blank, 24 Ill. App. 438; Mason v. R. R., 111 N. Car. 482; Bloyd v. R. R., 58 Ark. 66; Stephens v. R. R., 86 Mo. 221; Burlington R. R. v. Crockett, 19 Neb. 138. We consider this a very close test In all these cases the different courts simply held that persons answering to the tests laid down are vice principals or representatives of the master, but, as in all such iron clad tests, the theory of the law which they attempt to apply is not always effectuated. The true rule is to presume nothing in favor of either a superior or subordinate servant as representing the master. Let the facts of each case decide that question unburdened by any presumptions. If, under the facts in any case, a servant, whether superior or subordinate, is charged with any of the master's duties, the master is liable. The whole inquiry must be turned to a consideration of the nature of the act itself to see whether it is a duty peculiarly one belonging to the master, and properly delegated to the servants. The tests which have been applied in the cases we have mentioned may all be considered, but no one of them should be made a conclusive test, as it is absolutely impossible to set any definite limits to a rule of this kind. Under this view of the case if the servant is performing a duty which the law imposes upon the master, or is acting in that particular transaction in the capacity of the master, the master is liable; if such duty is not one which the law imposes upon the master, or the act could not be considered an expression of the master's authority over the servant injured, the master is not liable. The superiority or inferiority of the servant has practically no effect whatever on the question. This rule gives the court free rein, and does not bind it to the application of any one test. It is, therefore, the safest rule and is supported by the great weight of authority. Baltimore R. R. v. Baugh, 149 U. S. 368; Colorado Coal Co. v. Laub, 6 Colo. App. 255; Maltise v. Manfacturing Co., 46 La. Ann. 1535; Sullivan v. R. R., 62 Conn. 209; Newberry v. Lumber Co., 100 Iowa, 441; Norfolk R. R. v. Hoover, 79 Md. 253, 47 Am. St. Rep. 392; South Florida R. R. v. Weese, 32 Fla. 212; Robertson v. R. R., 146 Ind. 486; O'Brien v. Rideout, 161 Mass. 170; Miller v. Coffin, 19 R. I. 164; Andrew v. Elevator Co. (Mich. 1898), 76 N. W. Rep. 86; Carlson v. Telephone Co., 68 Minn. 428; Richmond Locomotive Works v. Ford, 94 Va. 627; McMahon v. Mining Co., 95 Wis. 308; Ell v. R. R., 1 N. Dak. 336, 26 Am. St. Rep. 621; Jackson v. R. R., 43 W. Va. 380; Mast v. Kern (Oreg. 1898), 54 Pac. Rep. 950.

ALEXANDER H. ROBBINS.

JETSAM AND FLOTSAM.

ABOLISHMENT OF COMMON LAW MARRIAGES IN NEW YORK.

The law abolishing so called common-law marriages, which was enacted by the legislature of New York at its last session, went into effect on January 1, 1902. It provides that a marriage which is not solemnized by a minister or other authorized person

shall not be legal, unless the persons desiring to marry sign a written contract in the presence of at least two witnesses subscribing to the same. The contract must state the place of residence of each of the parties and witnesses and the date and place of marriage, and must be acknowledged by the parties and witnesses in the manner required for the acknowledgment of a conveyance of real estate to entitle the same to be recorded. Such contract shall be filed within six months after its execution in the office of the clerk of the town or city in which the marriage was solemnized. The new law further provides that no marriage claimed to have been contracted on or after January 1, 1902, within this state, otherwise than in this article provided, shall be valid for any purpose whatever, provided, however, that no such marriage shall be deemed or adjudged to be invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person solemnizing the same, is consummated with a full belief on the part of the persons so married, or either of them, that they were lawfully joined in marriage or on account of any mistake in the date or place of marriage or in the residence of either parties.—*The Albany Law Journal.*

BOOK REVIEWS.

CYCLOPEDIA OF LAW AND PROCEDURE—VOLUME 3.

The rapidity with which the publishers are issuing these volumes must be a surprise to the legal profession as well as to publishers. Speed is sometimes associated with superficialty. This allegation cannot, however, be made against this volume nor against either of its predecessors. This volume begins with the concluding sections of Appeal and Error by Judge Walter Clark, being considerably the largest subject occupying 500 pages, followed by Appearances, by W. A. Martin, 39 pages; Apprentices, by Roger Foster, 29 pages; Arbitration and Award, by Francis J. Kearful, 244 pages; Army and Navy, by Henry A. Sharpe, 55 pages; Arrest, by John C. Myers, 115 pages; Arson, by Edmund Burke, 32 pages; Assault and Battery, by James Beck Clark, 98 pages. We here have a book of over 1,100 large royal octavo pages containing eight distinct law treatises. Not each treatise large enough for a full size law book, it is true, because all excepting one of the topics here referred to are narrow topics. It is safe to say, however, that as much has been said on each topic as will be found necessary to lead the searcher into the heart of each one of the subjects discussed. The foot notes are not only references to the numerous authorities but most of them are digests of the cases referred to.

We cannot speak too highly of the first subject mentioned in this review—Appeal and Error edited by Walter Clark of the Supreme Court of North Carolina. No treatise on this important subject has heretofore been offered to the profession as thoroughly and ably prepared as the one by Judge Clark. A highly commendatory feature of this publication is the references to the different sections of the Century Digest, pointing out where parallel treatment of different sections may be found and treated from the digest point of view. The Century Digest gives elaborate abstracts of all reported decisions of the United States. The subject of Arbitration and Award is very thoroughly treated in this volume by Francis J. Kearful, who has been a frequent contributor to this Journal, and whose contributions have always been received with much favor by our readers. Mr. Kearful seems to have fully and thoroughly covered the subject of Arbitration and Award. The editors of Cyclopedia of Law and Procedure are William Mack and Howard P Nash. Published by American Law Book Company, 96 William Street, New York.

WASHBURN ON REAL PROPERTY.

No work stands higher among the classics of legal literature than Washburn on Real Property. In the first edition, published in 1860, the author states that he entered upon this great undertaking under the conviction that there was urgent need of a work which, while it retained so much of the English common and early statute law as applied to this country, should combine with it, as a basis, the elements of American law as the same had been developed in the legislation and judicial decisions of the general and state governments, in order to form as nearly as might be one homogeneous system. "To do this," says Mr. Washburn, "required the subject to be treated in some of its parts historically, and sometimes to refer to what had become practically absolete, every intelligent reader will readily understand. The American statesman who should content himself with studying the simple text of the constitution without the light which English and colonial history throws upon its provisions, would find himself at a loss to understand, or how to solve, many of the questions to which the construction of that instrument has given and is giving rise. So the American lawyer would find still greater difficulty in understanding that great unwritten body of principles which form the basis of the common law of nearly every state in the Union, if he could not go back historically to the coming in of the feudal system at the conquest, read the charter of Runnymiede in the light of the circumstances which surrounded it, and trace the gradual loosening of the bands of tenure before and at the passage of the statute of *quia emptores.*" This statement of the author throws a strong light on the inherent excellencies of the work which at once forced it to the front as the first and final authority on the subject of real property. It deals with fundamental principles, not with mere cases, in which respect it differs very strikingly from more than half of the text-books prepared in late years by authors whose capacity for greatness is measured more accurately by the printer's stick than by any real attainment in putting the law upon a higher scientific basis. Books like Washburn on Real Property cannot be written in six months under contract. Neither are they lost sight of with the passing of a generation. They are the landmarks of the law which notes its progress, and its exact limitations. Washburn on Real Property takes first rank as one of the masterpieces of the law, the luster of whose fame has not been dimmed, but rather heightened by the mercenary attempts that have been made to share its high place in the jurisprudence of this country. This new edition has been revised and brought down to date by the addition of the late cases, under the competent direction of Prof. John Wurts of Yale University. Printed in three volumes of about 580 pages each, and bound in the best quality of law sheep. Published by Little, Brown & Co., Boston, Mass.

BOOKS RECEIVED.

University of Pennsylvania. The Proceedings at the Dedication of the New Building of the Department of Law. February 21st and 22d, 1900. Compiled by George Erasmus Nitzsche, at the request of the Faculty of the Department of Law. Philadelphia, 1901.

HUMORS OF THE LAW.

A correspondent sends us the following interesting anecdote: That members of boards constituted to examine applicants for admission to the bar frequently receive most unexpected answers to some of their questions, is a fact of common knowledge among all who ever officiated in such a capacity. No tenet of jurisprudence, of however ancient and dignified standing, is immune from being given a humorous twist, almost invariably unintentionally, by some aspiring, but scarcely precocious sprig of the law. In a recent bar examination in one of the middle western states, the class of candidates was being quizzed orally by the examiners, and a somewhat youthful looking applicant was on the rack. "Give me the rule in Shelley's case," said the dignified questioner, rather austerely. The young man looked somewhat dazed but bravely made a drive at the mark. "The rule in Shelley's case," he said, "is the same as in every other man's case. 'The law is no respecter of persons.'"

Mr. Justice Channell, in addressing the grand jury at Lampeter, remarked that one of the principal duties of a judge in visiting Cardiganshire was to offer congratulations on the absence of serious crime. He mentioned the desirability of changing the dates of the assizes, so that the work in connection with busy assizes such as Glamorganshire might be more evenly distributed. There being no cases for trial, the high sheriff presented the judge with a pair of white gloves, and the token of immunity from crime having been gracefully acknowledged by his lordship the court rose.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

1. ADVERSE POSSESSION—Proof of Possession. — Defendant, *in detinue* by a conditional vendor or claimant, may establish possession by virtue of limitations under plea of the general issue.—L. Grunewald Co. v. Copeland, Ala., 30 South. Rep. 878.

2. ANIMALS — Vicious Dogs.—Where a dog had never attempted to bite any one, his owner is not liable by the mere fact that one day he does bite.—Martinez v. Bernhard, La., 30 South. Rep. 901.

3. APPEAL AND ERROR—Effect of First Appeal.—On determination of a first appeal, deciding question presented by a second appeal, the latter will be dismissed.—Read v. San Diego Union Co., Cal., 67 Pac. Rep. 1.

4. APPEAL AND ERROR—Necessity of Quoting the Testimony.—An assignment of error as to the admission of testimony over objection, which does not quote the testimony given, will not be considered by the appellate court.—Acklin v. McCalmont Oil Co., Pa., 50 Atl. Rep. 955.

5. APPEAL AND ERROR—Presumptions as to Evidence Where Judgment Alone is Taken Up. — Where the record is taken to the appellate court on the judgment roll alone, it will not be presumed that there was evidence on points in respect of which there is no finding.—Greer v. Greer, Cal., 67 Pac. Rep. 20.

6. APPEAL AND ERROR—Time of Taking.—Under Act April 4, 1877, and Act May 20, 1891, p. 101, an appeal from an order opening a judgment entered on a judgment note could be taken within six months, or after the issue is tried and final judgment entered.—Schomaker v. Dean, Pa., 50 Atl. Rep. 928.

7. ARREST—Right to Suspicion the Commission of a Felony.—The question whether an officer, arresting one without warrant, has reasonable cause to believe a felony to have been committed, when there is no dispute as to the facts, is one of law.—State v. Shaw, Vt., 50 Atl. Rep. 863.

8. ARREST—When Bail Warrant Required.—V. S. § 1981, held not to require a bail warrant when, in the discretion of the court, one on trial for felony is ordered into custody as authorized by the statute.—State v. Shaw, Vt., 50 Atl. Rep. 863.

9. ASSIGNMENT—Right to Sue to Avoid a Fraud.—The rule that a mere naked right to sue in equity to avoid a fraud is not assignable does not apply to a case where the right is merely incidental to a subsisting substantial property right which has been assigned; and in such a case the assignee may maintain the action.—National Val. Bank v. Hancock, Va., 40 S. E. Rep. 611.

10. ATTORNEY AND CLIENT—Authority of Attorney to Indorse Draft Payable to Client.—Where an attorney with authority to collect a claim receives a draft drawn on the paying agent of the drawer for the amount of the claim, he has implied authority from his client to indorse the draft to enable him to receive the amount due thereon.—National Fire Ins. Co. v. Eastern Building & Loan Assn., Neb., 88 N. W. Rep 863.

11. ATTORNEY AND CLIENT—Authority to Bind Client.—Attorney at law held to have no authority to bind his clients to pay commissions to broker for obtaining tenant.—Callaway v. Equitable Trust Co., N. J., 50 Atl. Rep. 900.

12. BANKRUPTCY — Attempt to Collect Judgment.—The fact that the claim of a creditor is omitted from a bankrupt's schedule will not entitle him to collect a judgment obtained thereon, where he has knowledge of the proceedings, and such attempt will be stayed

until the bankrupt's right to a discharge has been determined.—*In re* Beerman, U. S. D. C., N. D. Ga., 112 Fed. Rep. 662.

13. BANKS AND BANKING — Rights of Receiver of National Bank.—The receiver of a national bank succeeds to no rights beyond those which could have been enforced by the bank, its stockholders, or creditors. He is not entitled to have a contract made by the bank, which has been executed, set aside on the ground merely that it was *ultra vires*. — Brown v. Schleier, U. S. C. C., D. Colo., 112 Fed. Rep. 577.

14. BENEFIT SOCIETIES—Subsequent Amendments.—Where the by-laws of a mutual hail insurance association at the time of the issuance of insured's policy made no provision for the suspension of policies for failure to meet assessments, insured was not bound by a subsequent amendment providing for such suspension.—Farmers' Mut. Hail Ins. Assn. v. Slattery, Iowa, 88 N. W. Rep. 949.

15. BENEFIT SOCIETIES — Vested Interest of Beneficiary.—The interest of the beneficiary in a mutual benefit association life policy cannot be taken away without his consent, unless change of beneficiaries is authorized by the policy of the by laws of the association.—Hill v. Groesbeck, Colo., 67 Pac. Rep. 167.

16. BILLS AND NOTES—Action by Joint Payees.—A note to either of two payees gives to each the right to recover thereon, as well as the right to maintain a joint action.—Collyer v. Cook, Ind., 62 N. E. Rep. 655.

17. BLLS AND NOTES.—Computation of Maturity.—A note executed November 11th, payable six months after date, matures May 11th following.—Doyle v. First Nat. Bank, Ala., 30 South. Rep. 880.

18. BILLS AND NOTES—Order Stolen From Maker.—Order stolen from maker before delivery cannot be enforced by any subsequent holder.—Salley v. Terrill, Me., 50 Atl. Rep. 896.

19. BILLS AND NOTES — Rights of Transferee after Maturity. — An indorsee of a note, taking the same after maturity, does not take subject to the equities of a third person whose rights are latent.—Mohr v. Byrne, Cal., 67 Pac. Rep. 11.

20. BONDS—Suing on Distinct Breaches.—In declaring on bond with conditions, several distinct breaches cannot be included in one assignment.—Ordinary of State of New Jersey v. Barnes, N. J., 50 Atl. Rep. 903.

21. BOUNDARIES — Parol Evidence of Location of Stakes.—Parol evidence of location of stakes, etc., marking the boundaries of an oyster lot, and fixed by oyster committee, held admissible in explanation of map.—Hamilton v. Smith, Conn., 50 Atl. Rep. 884.

22. BROKERS—Claim of Tenant's Broker on Landlord.—A broker representing tenant during negotiations for lease has no claim upon landlord.—Callaway v. Equitable Trust Co., N. J., 50 Atl. Rep. 900.

23. BUILDING AND LOAN ASSOCIATIONS—Non-Payment of Premiums after Maturity of Loan.—Under provision in stock certificate of building and loan association, a borrower held entitled on maturity of loan to credit for only withdrawal value of stock, and not par value, and association may foreclose for non-payment of premiums and interest after maturity of loan. —Plank v. Indiana Mut. Building & Loan Assn., Ind., 62 N. E. Rep. 652.

24. BUILDING AND LOAN ASSOCIATIONS. — Usury in Payment of Dues and Assessments.— By-laws of a building and loan association requiring members to pay certain dues and assessments in addition to legal rate of interest on loans held not to render the loans usurious.—Farmers' Savings & Building & Loan Assn. v. Kent, Ala., 30 South. Rep. 874.

25. CARRIERS — Imputable Negligence of Father.—The question of a father's negligence in permitting his son, 14 years of age, to go on a street car to a public park in company with his married sister and her husband, held to be for the jury.—Muhlhause v. Monongahela St. Ry. Co., Pa., 50 Atl. Rep. 940.

26. CARRIERS — Resisting Payment of Bridge Toll.—A passenger on a railroad, who resists payment of an illegally enacted bridge toll until force is used on his person, for the sole purpose of enhancing his damages, is not entitled to recover for such added indignities.—Patterson v. Southern Pac. Co., Tex., 66 S. W. Rep. 308.

27. CERTIORARI—Copy of Order.—Where an affidavit for a writ of review does not set forth a copy of the order complained of, as required by rule 2 of the supreme court, nor state any excuse therefor, the application will be denied.—State v. District Court of Second Judicial District, Mont., 67 Pac. Rep. 114.

28. CHAMPERTY AND MAINTENANCE — Conveyance to Adverse Holder.—A person conveying land held adversely, and thereafter conveying to the adverse holder the same land, cannot maintain ejectment in favor of his first grantee.—Dever v. Hagerty, N. Y., 62 N. E. Rep. 586.

29. COMPOSITION WITH CREDITORS—One Creditor Not a Party.—That one creditor whose claim was disputed was not a party to a composition between the debtor and his creditors held not to invalidate the agreement. —Crawford v. Krueger, Pa., 50 Atl. Rep. 931.

30. COMPROMISE AND SETTLEMENT—Attacking Former Contract.—Where one contract is settled by the execution of another, the validity of the former cannot be raised as a defense to a suit on the latter, in the absence of fraud or mistake.—Baldwin v. Central Sav. Bank, Colo., 67 Pac. Rep. 179.

31. CONTRACTS — Consideration of Father's Contract to Pay for Child's Services.—A note executed by a father in favor of his child, to compensate the child for services rendered while living in the father's home, found a sufficient consideration in the moral obligation resting on the father to pay therefor.—*In re* Sutch's Estate, Pa., 50 Atl. Rep. 943.

32. CONTRACT—Recovery on Quantum Meruit.—There can be no recovery on *quantum meruit* where an express contract is relied upon.—Hayes v. Bunch, Mo. App., decided at St. Louis, Jan. 14, 1902, not yet reported.

33. CONTRACTS—Tender.—A tender was not necessary to entitle plaintiff to sue for breach of contract, where he had demanded the property agreed to be delivered, and offered to pay therefor, but defendant refused compliance.—Baldwin v. Central Sav. Bank, Colo., 67 Pac. Rep. 179.

34. CORPORATIONS—Action for Damages After Sale Under Decree.—The fact that the railroad property of defendant corporation had been sold under decree of court furnished no reason for dismissing an action by a passenger for injuries, as the corporation continued to exist, at least until its liabilities were settled.—Chesapeake & N. Ry. v. Hanmer, Ky., 66 S. W. Rep. 375.

35. CORPORATIONS— Effect of Change of Names.—Change of corporate names does not change corporate identity.—Young v. Marion-Sims College, Mo. App., decided at St. Louis, Jan. 14, 1902, not yet reported.

36. CORPORATIONS — Inspection of Books.—Before *mandamus* to compel inspection of books of a trading company will issue, the complaint must show that the application was sought for a specific purpose.—Bruning v. Hoboken Printing & Publishing Co., N. J., 50 Atl. Rep, 906.

37. CORPORATIONS—Power of General Manager to Employ Agents.—Authority of general superintendent is presumptively limited to the usual means of accomplishing the business intrusted to him. They have, therefore, no right to appoint general agents.—Skene v. Union Casualty Co., Mo. App., decided at St. Louis, Jan. 1902, not yet reported.

38. CORPORATIONS— Rights of Directors. — Where plaintiff was authorized by a resolution of defendant's directors to make leases of mines and fix the terms in the first instance, to take effect on the approval of a certain person, the terms, when so fixed and approved, could not be changed without the authority

or consent of the directors.—Allunde Consol. Min. Co. v. Arnold, Colo., 67 Pac. Rep. 28.

39. CORPORATIONS—Ultra Vires.—The *ultra vires* act of a corporation in purchasing claims for damages against a city held a defense to an action against the city therefor.—City of Pueblo v. Shutt Inv. Co., Colo., 67 Pac. Rep. 162.

40. COSTS — Extra Expense of Amendment of Transcript.—Where an original answer is rendered nugatory by the filing of an amended answer, the cost of including such original answer in the abstract on appeal will be taxed to the appellant.—Hammer v. Downing. Oreg., 67 Pac. Rep. 30.

41. COSTS—Of Additional Abstracts.—Appellant will be taxed with the cost of her additional abstract, an unnecessary extension of the evidence being contained therein.—Hawkeye Loan & Brokerage Co. v. Gordon, Iowa, 88 N. W. Rep. 1081.

42. COUNTERCLAIM—Answering Over After Demurrer. —A defendant, who answers over after a demurrer to a counterclaim set up by him has been sustained, waives any error that may have committed thereby.—Rutenic v. Hamakar, Oreg., 67 Pac. Rep. 196.

43. COURTS—Determining Supreme Court's Jurisdiction.—Judgment from which an appeal is taken determines the supreme court's jurisdiction on appeal in action relating to real property.—Weiss v. Gullett Colo., 67 Pac. Rep. 155.

44. COVENANTS—Existence of Easement.—The existence of an easement in real estate, not excepted in a covenant of warranty, is a breach of the covenant, entitling the grantee to damages, though he had knowledge of the easement at the time of the purchase.—Sherwood v. Johnson, Ind., 62 N. E. Rep. 645.

45. CREDITORS' SUIT — Necessity of Issuance of an Execution.—The issuance of an execution is not necessary to entitle a judgment creditor to maintain a suit in equity to subject property fraudulently transferred by the debtor, where by statute the judgment is made a lien on all the defendant's property.—Lazarus Jewelry Co. v. Steinhardt, U. S. C. C. of App., Fifth Circuit, 112 Fed. Rep. 614.

46. CRIMINAL EVIDENCE — Admissibility of Confession.—Before testimony of a confession is admitted, defendant's attorney should be permitted to question the witness as to the circumstances under which the confession is made.—People v. Miller, Cal., 67 Pac. Rep. 12.

47. CRIMINAL EVIDENCE—Docket Entries of Court.—The docket entries of a court of general jurisdiction are admissible to show what was done by the court as to committing one surrendered in discharge of his bail.—State v. Shaw, Vt., 50 Atl. Rep. 863.

48. CRIMINAL EVIDENCE — Proof of Occurrences in Flight and Pursuit of Accused.—On a prosecution for murder, held proper to permit the state to show all that occurred after the homicide, in respect to the flight and pursuit of accused, until his arrest.—State v. Shaw, Vt., 50 Atl. Rep. 863.

49. CRIMINAL TRIAL—Permitting Jury to Take Photographs and Plans into Jury Room.—On a prosecution for murder, it was not error to permit the jury to take to the jury room certain photographs and a plan showing where deceased and accused had stood at the time of the homicide.—State v. Shaw, Vt., 50 Atl. Rep. 863.

50. CROPS—Detached Crops.—Where a crop is already detached from the soil and left on the ground, its taking away held no offense under section 8 of Act No. 8 of the extra session of 1870.—State v. Green, La., 30 South. Rep. 898.

51. CUSTOMS AND USAGES — Custom as Giving Authority to Agent.—A principal's business being confined to manufacture of mining machinery, no custom can bind it by the unauthorized act of its agent in buying such machinery.—Gates Iron Works v. Denver Engineering Works Co., Colo., 67 Pac. Rep. 173.

52. CUSTOMS AND USAGES—Making Payments on Subcontracts.—Where, at the time of making a subcontract for materials, a building contractor did not know the custom as to making payments on such subcontracts, it was not error to exclude evidence of such custom in an action to recover for such materials.—McDonough v. Evans Marble Co., U. S. C. C. of App., Sixth Circuit, 112 Fed. Rep. 634.

53. CUSTOMS DUTIES—Exemption of Consignments to Educational Institutions.—A hospital, with incidental educational features, is not an institution established solely for educational purposes, nor a seminary of learning, and is not entitled to import surgical instruments free of duty, under paragraph 638 of the tariff act of 1897.—Massachusetts General Hospital v. United States, U. S. C. C. of App., First Circuit, 112 Fed. Rep. 670.

54. DAMAGES—Breach of Contract of Sale.—Where defendant failed to deliver sheet steel under its contract, and plaintiff manufactured the sheets, it could recover difference between contract price and cost of the material and expense of manufacture, but might not charge profit.—Pittsburg Sheet Mfg. Co. v. West Penn Sheet Steel Co., Pa. 50 Atl. Rep. 935.

55. DAMAGES—Liquidated Damages for Failure to Complete Contract.—The penalty of a bond required by a city on granting an electric light franchise to secure its completion by a specified date held liquidated damages, recoverable without allegation or proof of actual damages.—City of Salem v. Anson, Oreg., 67 Pac. Rep. 190.

56. DAMAGES—Liquidated Damages for Failure to Fulfill Contract.—Amount named in telephone company's bond, conditioned upon fulfillment of its contract with city, held liquidated damages, and not penalty.—City of New Britain v. New Britain Co., Conn., 50 Atl. Rep. 881.

57. DEATH—Loss of Wife's Society as Damages.—In an action for the death of a married woman, the husband and children can recover for loss of her society and protection.—Green v. Southern California Ry. Co. Cal., 67 Pac. Rep. 4.

58. DEEDS—Binding Force of Unrecorded Deed.—Private deed of land, though not recorded, held binding on the heirs of vendor and those having notice thereof.—Willett v. Andrews, La., 30 South. Rep. 883.

59. DEEDS—Reference in Deed to Another Deed as to Boundary.—Reference in a deed to another deed held sufficient to warrant the employment of the deed referred to in determining the boundary.—Post Hill Imp. Co. v. Brandegee, Conn., 50 Atl. Rep. 874.

60. DESCENT AND DISTRIBUTION—What Law Governs. —Where intestate died in 1897, while Comp. Laws 1888, §§ 4113, 4119, relative to distribution of estates was in force, but the orders settling the estate were made after Rev. St. 1898, §§ 3846, 3847, relating to the same subject, took effect, the orders were properly made in accordance with the statutes in force at the time the orders were made.—*In re* Thorn's Estate, Utah, 67 Pac. Rep. 22.

61. DISCOVERY—Construction of Will.—Where bill in partition also seeks discovery, and alleges that defendants have in possession a will giving title to complainant, the court will construe the will in question, to determine whether complainants have a right to the discovery.—Hanneman v. Richter, N. J., 50 Atl. Rep. 904.

62. DIVORCE — What Constitutes Desertion.—Where husband and wife live together at the wife's mother's house, and the husband leaves because he dislikes his mother-in law, the wife cannot get a divorce for desertion where she does not show a willingness to go with her husband, since a wife must follow the husband wherever he takes up his domicile.—Schuman v. Schuman, Mo. App., decided at St. Louis, Jan. 14, 1902, not yet reported.

63. EASEMENTS—Ways of Necessity.—A way of necessity cannot arise, nor will a grant of such way be so

sumed, where the property, access to which is sought thereby, is acquired by the petitioners by condemnation.—Banks v. School Directors of Dist. No. 1, Ill., 62 N. E. Rep. 604.

64. EJECTMENT — Burden of Proof.—Where weight of testimony and facts sustain claim of title, it will be held legal against one not showing better right to the property.—Willett v. Andrews, La., 30 South. Rep. 883.

65. ELECTIONS — Numbering Ballots.—Const. art. 8, § 4, requiring every ballot to be numbered as received, does not apply to an election for increase of indebtedness of school districts.—Rebman v. School Dist. of Borough of Crafton, Pa., 50 Atl. Rep. 972.

66. EMINENT DOMAIN—Rules Controlling Conduct of Commissioners.—Commissioners appointed to determine damages, according to an agreement of parties, though not appointed pursuant to statute, are subject to the rules controlling the conduct of juries and other bodies of like character.—City of Pueblo v. Shutt Inv. Co., Colo., 67 Pac. Rep. 162.

67. EQUITY — Jurisdiction.—Respondent in a bill not cognizable in equity held entitled to raise the question of jurisdiction at any stage of the proceedings.—Williams v. Fowler, Pa., 50 Atl. Rep 969.

68. EQUITY—Laches of City in Enforcing Its Taxes.—Laches in a municipal corporation in bringing proceedings to enforce its right to taxes is not ground for demurrer.—Town of Fairplay v. Board of Comrs. of Park County, Colo., 67 Pac. Rep. 152.

69. EQUITY—Multifariousness.—That bill to foreclose mortgage seeks also to correct description held not to render it multifarious.—District Grand Lodge No. 7, I. O. B. B., v. Marx, Ala., 30 South. Rep. 870.

70. ESTOPPEL—Declaring on Bill of Lading.—Plaintiff, declaring on a bill of lading, cannot afterwards assert its invalidity.—Washburn-Crosby Co. v. Boston & A. R. R., Mass., 62 N. E. Rep. 590.

71. ESTOPPEL—Present at Sale.—A widower, present at administrator's sale of deceased wife's land for payment of mortgage, and making no claim to right therein, held estopped to claim a third interest as against the purchaser.—Roach v. Clark, Ind., 62 N. E. Rep. 634.

72. EVIDENCE — Admissibility of Business Letters.—In an action for injury from a defective sidewalk, a letter written by the chief inspector of public works, showing actual knowledge of the defect, held admissible, after his death, to show knowledge on the part of the city.—City of Denver v. Cochran, Colo., 67 Pac. Rep. 23.

73. EVIDENCE—Admissions.—Admission of defendants that they had received lumber from plaintiff's "stock" held not an admission of plaintiff's title to the entire stock.—Pacific Lumber Co. v. Prescott, Oreg., 67 Pac. Rep. 207.

74. EVIDENCE—Certificate of Death.—In an action on an insurance policy in which the action hinges on the question whether applicant made false representations as to what caused the death of a sister, the insurance company may introduce burial certificate to show that she died of consumption.—Ohmeyer v. Supreme Forest Woodmen Circle, Mo. App., decided at St. Louis, Jan. 14, 1902, not yet reported.

75. EVIDENCE—Contents of Lost Instruments.—Advertisement held not necessary to admissibility of evidence of contents of lost document.—Willett v. Andrews, La., 30 South. Rep. 883.

76. EVIDENCE—Letter of Deceased Containing Material Matter.—It is not error to admit a letter of a deceased city official containing material matter, over an objection that it is immaterial, though it also contains improper matter not specially objected to.—City of Denver v. Cochran, Colo., 67 Pac. Rep. 23.

77. EVIDENCE—Of Adoption of Resolution.—Adoption of resolution by company may be shown by evidence of persons present at its adoption.—Hendrie & Bolthoff Mfg. Co. v. Collins, Colo., 67 Pac. Rep. 164.

78. EVIDENCE—Private Memorandum Book.—Private memorandum book of officer in insurance company, sued for diverting mortuary fund, held not inadmissible, because contradicting the regular books of the company.—New Haven Trust Co. v. Doherty, Conn., 50 Atl. Rep. 890.

79. EVIDENCE — Proof of Contemporaneous Oral Agreement.—Though parol evidence is admissible to show a contemporaneous oral agreement which induced the making of a written contract, such evidence must be clear, precise, and indubitable.—*In re* Sutch's Estate, Pa., 50 Atl. Rep. 943.

80. EVIDENCE—Proof of Genuineness of Maps.—A surveyor, who has frequently examined and copied maps made by a former town surveyor and identified by his signature, may testify as to the genuineness of such maps and signature, though he never saw such former surveyor, who died before witness saw any of such maps.—Hamilton v. Smith, Conn., 50 Atl. Rep. 884.

81. EXECUTION — Presumption from Return Nulla Bona.—The return *nulla bona* of a district court execution, and the levy on real estate under a common pleas execution, after the judgment is transcripted, is *prima facie* proof that defendant had no personal property subject to execution.—Bulat v. Londrigan, N. J., 50 Atl. Rep. 909.

82. EXECUTORS AND ADMINISTRATORS — Ascertaining Rank of Creditor.—In ascertaining rank of creditor, the legal situation is to be taken as at the moment of his death.—Succession of Gragard, La., 30 South. Rep. 885.

83. EXECUTORS AND ADMINISTRATORS — Demanding an Accounting.—Partition among heirs, where suit went no further than citation, held not to bar a demand against the administrator for an accounting.—Succession of Wiemann, La., 30 South. Rep. 893.

84. EXECUTORS AND ADMINISTRATORS—Removal.—The discretion of the probate court in removing an executor should not be interfered with on appeal, unless abused.—*In re* Bell's Estate, Cal., 67 Pac. Rep. 128.

85. EXECUTORS AND ADMINISTRATORS — Repairing Real Estate.—Expenses of putting new roof on a house constituting the entire estate of decedent held a necessary expense of administration.—*In re* Thorn's Estate, Utah, 67 Pac. Rep. 22.

86. EXECUTORS AND ADMINISTRATORS—Rights of Executor After Removal.—An administrator, removed by the county court, is thereby devested of all power to pay any claim against the estate, and his act in appropriating funds of the estate to the satisfaction of its indebtedness to him is a nullity.—Rutenic v. Hamakar, Oreg., 67 Pac. Rep. 196.

87. EXECUTORS AND ADMINISTRATORS—Uncollectible Accounts.—Where executors, who are in a position to know the condition of the estate, report certain debts are desperate, the orphans' court has no power, in the absence of evidence showing them to be collectible, to charge the executors with such accounts.—Wrightson v. Tydings, Md., 51 Atl. Rep. 44.

88. EXECUTORS AND ADMINISTRATORS—Validity of Appointment.—That the petition for appointment of a special administrator did not show sufficient grounds therefor did not affect the validity of the appointment.—Breeding v. Breeding, Ala., 30 South. Rep. 881.

89. FACTORS — Right to Recover Cotton Consigned.—Cotton consigned for sale may be demanded from commission merchant on payment of indebtedness of consignor to merchant.—Succession of Gragard, La., 30 South. Rep. 885.

90. FALSE IMPRISONMENT — Arrest on Civil Writ of Trespass.—Where a person was arrested on a civil writ in an action of trespass, which was not entered in court, his remedy is by an action for malicious prosecution, and not for assault and false imprisonment.—Lisabelle v. Hubert, R. I., 50 Atl. Rep. 887.

91. FALSE PRETENSES—Claiming Bounty Under Invalid Ordinance.—Under Pen. Code, §§ 532, 664, defendant, falsely claiming bounty under invalid ordinance, held guilty of attempting to obtain money under false pretenses.—People v. Howard, Cal., 67 Pac. Rep. 148.

92. FENCES — Negligence in Putting on Barbed Wire.—A complaint, in an action for injuries resulting from contact with a barbed wire fence built by defendant across a road, held sufficient to warrant a charge permitting the jury to find negligence in leaving the fence without guard or warning.—Abilene Cotton Oil Co. v. Briscoe, Tex., 66 S. W. Rep. 315.

93. FIRE INSURANCE—Waiver.—A waiver of a condition in a fire policy against a change of interest or title by a former general agent, after the termination of the agency, held binding on the company.—Continental Ins. Co. v. Brooks, Ala., 30 South. Rep. 876.

94. FORGERY—Proof of Motion.—On a prosecution for forgery, evidence tending to show that the prosecutor was a man of means and that defendant knew this fact held admissible to show motive.—People v. Lapique, Cal., 67 Pac. Rep. 14.

95. FRAUDS, STATUTE OF — Proof of a Guaranty.—Under Act April 26, 1855 (P. L. 308), it was not competent for the plaintiff to show that an indorsement by defendant on a contract of the letters "O. K." was a guaranty; the only evidence permissible being that the letters constituted a guaranty in trade circles.—Moore v. Eisaman, Pa., 50 Atl. Rep. 982.

96. FRAUDS, STATUTE OF—Special Pleading.—In a suit on a contract, where the complaint does not show whether it is in writing, it is incumbent on the defendant to specially plead the statute of frauds, if he desires to raise that defense.—Baldwin v. Central Sav. Bank, Colo., 67 Pac. Rep. 179.

97. FRAUDS, STATUTE OF — Where Contract is Wholly Executed.—Where a contract within the statute of frauds has been wholly executed, such contract will not be interfered with at the suit of a mere donee, claiming adversely thereto.—Hill v. Groesbeck, Colo., 67 Pac. Rep. 167.

98. FRAUDULENT CONVEYANCES—Agreement of Judgment Creditor to Hasten Collection.—The fact that an agreement by a judgment debtor to hasten the collection of the judgment is made for a consideration will not, standing alone, justify an inference that the judgment creditor is acting with an intent to defraud other creditors.—Shibler v. Hartley, Pa., 50 Atl. Rep. 950.

99. FRAUDULENT CONVEYANCES — Assignment of Exempt Property.—Creditors have no right to complain of any disposition which a debtor may make of property that could in no event be taken by them for the satisfaction of their demands.—Green v. Baxter, Mo. App., decided at St. Louis, Jan. 27, 1902, not yet reported.

100. FRAUDULENT CONVEYANCES—Burden of Proof.—In a suit to set aside a bill of sale, the burden of proof is on the complainant to overcome the presumption in favor of the instrument by testimony clear, plain, and convincing beyond reasonable controversy.—Wilson v. Cunningham, Utah, 67 Pac. Rep. 118.

101. FRAUDULENT CONVEYANCES — Conveyance to Wife Through Third Person.—Conveyance of land by third party to debtor's wife at instance of husband, who had paid the purchase price, held void as against his creditors.—Watts v. Burgess, Ala., 30 South. Rep. 868.

102. FRAUDULENT CONVEYANCES—Necessary Allegations in Complaint.—Where, in an action to set aside a conveyance of real and personal property as fraudulent toward creditors, the complaint does not show that plaintiff has a lien, it fails to state a cause of action, and an objection to the admission of any evidence should be sustained.—Wyman v. Jensen, Mont., 67 Pac. Rep. 114.

103. FRAUDULENT CONVEYANCES — Right to Repay Trust Funds.—Where a debtor, acting as trustee for his minor children, has exercised the discretion reposed in him, and supported them out of the trust funds, he cannot restore the sums so expended to the trust estate, where by so doing he will evade the payment of his honest debts.—National Val. Bank v. Hancock, Va., 40 S. E. Rep. 611.

104. FRAUDULENT CONVEYANCES—Withholding Mortgage from Record.—Withholding a mortgage not fraudulent from the records at the request of the mortgagor to deceive the public renders it fraudulent as to persons extending credit without knowledge thereof.—Curtis v. Lewis, Conn., 50 Atl. Rep. 878.

105. GARNISHMENT—Intervention.—Certain telegram by garnishee, agreeing to hold property in behalf of principal defendant's creditors, held inadmissible against purchaser from such defendant, intervening in garnishment proceedings.—Hendrie & Bolthoff Mfg. Co. v. Collins, Colo., 67 Pac. Rep. 164.

106. GARNISHMENT — Of Fraudulent Vendee.—Under Code Civ. Proc. §§ 186, 1218, the garnishment of the fraudulent vendee of the stock of merchandise of a judgment debtor by the judgment creditor does not create a lien on such merchandise.—Wyman v. Jensen, Mont., 67 Pac. Rep. 114.

107. GIFTS—Delivery.—Where property is delivered to a third person as agent, to be given to the donee, delivery is incomplete until the donee has received it.—Bickford v. Mattocks, Me., 50 Atl. Rep. 894.

108. GRAND JURY — Qualification of Constable.—A constable is not disqualified from serving on the grand jury.—State v. Carter, La., 30 South. Rep. 895.

109. GUARDIAN AND WARD — Liability of Bondsman for Conversion.—Where retiring guardian converts a note of the estate the bondsman is not liable where it was committed prior to the giving of the bond.—Lincoln Trust Co. v. Wolf, Mo. App., decided at St. Louis, Jan. 14, 1902, not yet reported.

110. HEALTH—Relation Between Governor and State Board of Health.—Where the state board of health and governor are engaged in an investigation to determine the existence of the bubonic plague, it is not illegal for the state board of health to transmit the reports of certain physicians thereon to the governor, as directed by the latter.—McClatchey v. Matthews, Cal., 67 Pac. Rep. 134.

111. HIGHWAYS—Apportionment of Taxes Between Town and County.—Under Mills' Ann. St. § 3953, held, that action will not lie by a town against the county for failure of the commissioners to apportion taxes levied for road purposes.—Town of Fairplay v. Board of Comrs. of Park County, Colo., 67 Pac. Rep. 152.

112. HIGHWAYS—Meaning of Term "Street."—The term "street," in return of highway, as the place of beginning, imports a public highway.—Lord v. Gifford, N. J., 50 Atl. Rep. 903.

113. HOMICIDE — Right of Deputy to Arrest Escaping Prisoner.—A deputy sheriff, assisting the sheriff in the pursuit of one who had broken jail, held entitled to the same protection as the sheriff.—State v. Shaw, Vt., 50 Atl. Rep. 863.

114. HOMICIDE — Self-Defense.—Instruction on a prosecution for murder, where the defense was self-defense, held not erroneous, as making the law of self-defense depend upon the intent of the assailant, rather than on the belief of the assailed.—Harmon v. State, Ind., 62 N. E. Rep. 630.

115. HOMICIDE—Statements of Deceased in Presence of Accused.—Statements of the deceased to the effect that accused fired the first shot held inadmissible, though made in the presence of the accused and not contradicted by him; he being in arrest.—State v. Carter, La., 30 South. Rep. 895.

116. HUSBAND AND WIFE—Right of Married Woman to Sue.—A married woman, having an interest in a contract under seal to which she was not a party, held entitled to sue thereon in her own name, under Rev. St. 1874, p. 777, ch. 110, § 18.—American Splane Co. v. Barber, Ill., 62 N. E. Rep. 597.

117. HUSBAND AND WIFE — War as Affecting the Relation.—The mere fact that a married woman resided in Pennsylvania during the Civil War, while her husband was in the Confederate army, would not so affect their marital *status* as to give her the rights of a *feme sole*.—Stewart v. Conrad's Admr., Va., 40 S. E. Rep. 624.

118. IMPROVEMENTS — Subjection to Payment of Claims.—A creditor in a proper case may subject to the payment of his claim improvements made by his debtor on a third person's property.—National Val. Bank v. Hancock, Va., 40 S. E. Rep. 611.

119. INJUNCTION—Enjoining Police Department from Enforcing Law.—An injunction to restrain a city police department from interfering with the giving of "sparring exhibitions" cannot be granted.—Olympic Athletic Club v. Speer, Colo., 67 Pac. Rep. 161.

120. INSURANCE—Liability of Officers for Agent's Negligence.—In an action against the officers of an insurance company for negligence in permitting an agent to get behind in his accounts, it is no defense that the character of the business written by the agent was as good as that written by other agents of the company.—New Haven Trust Co. v. Doherty, Conn., 50 Atl. Rep. 887.

121. JUDGMENT—Conclusions Adverse to Plaintiff.—Where conclusions of law were found adversely to plaintiff on all issues necessary to be adjudged, it is no objection to the judgment that it does not adjudge plaintiff's rights, but only adjudges costs to defendants.—Greer v. Greer, Cal., 67 Pac. Rep. 20.

122. JUDGMENT—Opening Judgment on Motion of Surety.—It was not error to open a judgment entered on a judgment note on petition of a surety, who denied his signature thereto.—Schomaker v. Dean, Pa., 50 Atl. Rep. 923.

123. JUDGMENT—Records of Other Actions.—In ejectment, records of other actions of ejectment between other parties are inadmissible in evidence.—Reusens v. Cassell, Va., 40 S. E. Rep. 616.

124. JUDGMENT — Res Judicata.—A denial of a motion to vacate a judgment of the supreme court for costs and disbursements as prematurely entered is not *res judicata* as to the items of costs included in the bill.—Hammer v. Downing, Oreg., 67 Pac. Rep. 30.

125. JUDGMENT—Statute Extending Time of Judgment.—Laws 1891, p. 246, fixing the life of a judgment at 10 years, instead of 20, as authorized by Gen. St. § 1885, does not apply to a judgment existing at the date of its passage.—Jones v. Stockgrowers' Nat. Bank, Colo., 67 Pac. Rep. 177.

126. JURY — Scruples Against Capital Punishment.—On a prosecution for murder, the excusing of a veniremen for conscientious scruples against capital punishment held proper.—State v. Shaw, Vt., 50 Atl. Rep. 863.

127. JUSTICES OF THE PEACE—Questions of Law.—Where a justice renders judgment in an action in which the title and right of possession of real property are involved, on an appeal on questions of law alone the superior court should reverse the judgment.—King v. Kutner Goldstein Co., Cal., 67 Pac. Rep. 10.

128. LANDLORD AND TENANT—Presumption as to Lessor in Mining Lease.—In an action by one whose name appeared in an oil lease as a co-lessor, an instruction that, although the appearance of plaintiff's name raised the presumption that he was a lessor, it was not conclusive of that fact, held proper.—Acklin v. McCalmont Oil Co., Pa., 50 Atl. Rep. 955.

129. LARCENY—Proof of Ownership.—On trial for larceny, the taking and ownership being undisputed, all defendant's statements concerning a person from whom he claimed to have bought them are admissible.—People v. Chrisman, Cal., 67 Pac. Rep. 186.

130. LARCENY—Proper Information.—An information charging felonious taking of two mares is sufficient to charge larceny.—State v. Rathbone, Idaho, 67 Pac. Rep. 186.

131. LIFE INSURANCE — Effect of Infant's Warranties.—A beneficiary in a policy on the life of an infant is not bound by the infant's warranties in the application.—O'Rourke v. John Hancock Mut. Life Ins. Co., R. I., 50 Atl. Rep. 834.

132. LIFE INSURANCE—Vested Interest of Beneficiary.—Allegations that a party had a vested interest in a life policy by virtue of an antenuptial agreement and a gift *inter vivos* are not necessarily inconsistent.—Hill v. Groesbeck, Colo., 67 Pac. Rep. 167.

133. LIMITATIONS — Appropriations of Payments.—In order that a payment may take a debt out of the statute of limitations, there must be an appropriation on the part of the debtor.—Wilden v. McAllister, Mo. App., decided at St. Louis, Jan. 14, 1902, not yet reported.

134. LIMITATION OF ACTIONS — Implied Trusts.—Limitations run between the trustee and the *cestui que trust* in an implied trust.—Redford v. Clark, Va., 40 S. E. Rep. 630.

135. LIMITATION OF ACTIONS — Personal Liability of Corporation Directors.—Under Mill's Ann. St. §§ 491, 2967, limitations begin to run on the personal liability of directors of a corporation for its debts for failure to file its annual report when their default occurs.—Hazelton v. Porter, Colo., 67 Pac. Rep. 170.

136. MALICIOUS MISCHIEF — Proof of Malice.—In a prosecution under Gen. Laws, ch. 279, § 28, as amended by Pub. Laws, ch. 786, punishing malicious injury of buildings, it is not necessary to show express malice toward the owner of the building.—State v. Gilligan, R. I., 50 Atl. Rep. 844.

137. MANDAMUS — Costs of Succession.—In *mandamus* to compel district judge to tax costs of succession, the writ will not be granted, where the executrix has been removed from office, and no successor has been appointed with whom the question of costs could be liquidated.—State v. Thompson, La., 30 South. Rep. 899.

138. MANDAMUS—Right to Copy Public Records.—*Mandamus* compelling the secretary of the state board of health to permit plaintiff to copy certain records will not issue where the answer of the secretary shows they have been transmitted to the governor.—McClatchy v. Matthews, Cal., 67 Pac. Rep. 134.

139. MANDAMUS—To Compel Clerk to Approve Supersedeas Bond.—Application for *mandamus* to supreme court will not lie to compel the clerk of the district court to approve a *supersedeas* bond until there has been an application to the district court, under Code Civ. Proc. § 889, authorizing it to direct the clerk as to his official duties, and its refusal to act.—State v. Houseworth, Neb., 88 N. W. Rep. 858.

140. MARRIAGE—Insanity as Avoiding a Marriage.—Pennsylvania courts have no jurisdiction to determine the validity of a marriage alleged to be void on account of lunacy of one of the contracting parties.—Pitcairn v. Pitcairn, Pa., 50 Atl. Rep. 963.

141. MASTER AND SERVANT — Assumption of Risk.—Plaintiff in an action for personal injuries caused by getting stuck between a beer vat and the floor while cleaning out under the former, held precluded from recovering by assumption of risk.—Baumler v. Narragansett Brewing Co., R. I., 50 Atl. Rep. 841.

142. MASTER AND SERVANT—Deck Hand and Mate of Vessel Fellow-Servants.—A deck hand held a fellow-servant with the mate of a vessel, so as to preclude recovery from the master for negligence of the mate.—Kelly v. New Haven Steamboat Co., Conn., 50 Atl. Rep. 871.

143. MASTER AND SERVANT — Injury Through Disobedience.—Where a railroad employee disobeys a reasonable rule of the company, and his disobedience is the proximate cause of the injury, he cannot recover therefor unless obedience was impracticable under the circumstance.—Green v. Brainerd & N. M. y., Minn., . .

144. MASTER AND SERVANT — Liability for Causing Arrest of Passengers.—A street railroad is liable to a passenger who is arrested after leaving a car at the instigation of a conductor. — Grayson v. St. Louis Transit Co., Mo. App., decided St. Louis, January 27, 902, not yet reported.

145. MASTER AND SERVANT—Liability for Latent Defects.—In an action for injuries sustained by engineer by the breaking of an iron elbow in a water main, if the accident were due to defective material, and the defect was not apparent, the master could not be held liable.—Alexander v. Pennsylvania Water Co., Pa., 50 Atl. Rep. 991.

146. MASTER AND SERVANT—Liability for Latent Defects.—A railroad company is not liable for injuries sustained by an employee by the giving away of the foundation on which an embankment rests, where it was made by a different company 40 years before the accident, and there was no obvious defect in its construction. — Norfolk & W. Ry. Co. v. Poole's Admr., Va., 40 S. E. Rep. 627.

147. MASTER AND SERVANT — Volunteer Service. — Where a workman, at the request of his foreman, voluntarily assists in replacing a derailed car, the fact that he so went voluntarily does not release the company's foreman from the duty of giving warning as to any hazards.—Texas & P. Ry. Co. v. Utley, Tex., 66 S. W. Rep. 311.

148. MECHANICS' LIEN — Costs of Foreclosure Proceedings.—In a suit by a mechanic's lien claimant against mortgagees for priority, it was not error for the master to allow the latter costs for the foreclosure proceedings, if limited to actual and necessary expenses.—Blackmar v. Sharp, R. I., 50 Atl. Rep. 852.

149. MECHANICS' LIENS—Filing Accounts.—Accounts filed for the commencement of mechanic's lien proceedings cannot be amended so as to increase the amount.—Harris v. Page, R. I. 50 Atl. Rep. 859.

150. MECHANICS' LIENS — Priority of Laborers and Material-Men.—The holder of a promissory note secured by a debt due for work done on a house, who had no notice of material-men's claim, held to have a right to the funds in litigation superior to that of the material-men.—Perry v. Parrott, Cal., 67 Pac. Rep. 144.

151. MECHANICS' LIEN — Subcontractor's Lien. — Burns' Rev. St. 1901, § 7255, does not give a mechanic's lien to a subcontractor without the filing of notice, even though the debtor is insolvent. — Sulzer-Vogt Mach. Co. v. Rushville Water Co., Ind., 62 N. E. Rep. 649.

152. MINES AND MINERALS—Abandonment of Quarry. —Lessee of stone quarry held not to have abandoned the same, so as to prevent recovery from one who buys it from the lessor and takes away the stone quarried by him.—Russell v. Stratton, Pa., 50 Atl. Rep. 975.

153. MINES AND MINERALS — Notice of Forfeiture.—Notice of forfeiture of the interest of a co-owner of a mining claim held insufficient.—Haynes v. Biscoe, Colo., 67 Pac. Rep. 156.

154. MORTGAGES—Right to Recover Deficiency Judgment.—Under Civ. Code, § 1432, and Code Civ. Proc. § 709, held, that one paying a deficiency judgment in foreclosure against himself and another for the debt of the other has a cause of action to recover such payment.—Treat v. Craig, Cal., 67 Pac. Rep. 7.

155. MORTGAGES—To Secure Purchase Price of Land. —A mortgage executed by a purchaser of land to secure the purchase price and future advances is valid from its date; the purchase price constituting a sufficient consideration therefor.—Blackmar v. Sharp, R. I., 50 Atl. Rep. 85.

156. MUNICIPAL CORPORATIONS — Care as to Public Walks.—Where a city keeps a much frequented walk open, it must use reasonable care to maintain it in at reasonably safe condition.—City of Denver v. Cochran, Colo., 67 Pac. Rec. 23.

157. MUNICIPAL CORPORATIONS — Dismissing Police Officers.—Under Portland City Charter 1898, the police commission may reduce the number of police officers, and dismiss officers, as an incident thereto, after trial, though the charter prohibits the mere dismissal of police officers without a hearing. — Venable v. Board of Police Comrs., Oreg., 67 Pac. Rep. 203.

158. MUNICIPAL CORPORATIONS—Proper Assessments. —Where the description given by the assessment and diagram of a street improvement is insufficient to identify the land assessed, the assessment, being void on its face, will not be cured by a failure to appeal.—Blanchard v. Ladd, Cal., 67 Pac. Rep. 131.

159. MUNICIPAL CORPORATIONS — Void Specifications for Street Improvements. — Void specifications for street improvement held not cured by a specific description of a portion of the improvement in the plans and profile.—Grant v. Barber, Cal., 67 Pac. Rep. 127.

160. NEGLIGENCE—Concerning Negligence of Defendant.—Where, in an action for injuries, the defense was an act of God, an instruction held not open to criticism as authorizing the jury to find for plaintiff, if there were any concurring negligence on the part of defendant, however trifling.—Helbling v. Allegheny Cemetery Co., Pa., 50 Atl. Rep. 970.

161. NEGLIGENCE—Walking on Street Car Track as Contributory Negligence.—A pedestrian, walking on street car track and struck by a car, held guilty of contributory negligence.—Perman v. McKeesport, W. & D. St. Ry. Co., Pa., 50 Atl. Rep. 973.

162. NEW TRIAL — Failure of Attorney to Produce Papers.—The violation of an attorney's agreement to produce certain papers held not a ground for a new trial.—Sulzer-Vogt Mach. Co. v. Rushville Water Co., Ind., 62 N. E. Rep. 649.

163. NOTICE—Constructive Notice of Executor.—Constructive notice to an executor as such cannot be imputed to him when acting in his individual capacity where his testator has left him no papers which would show him the true state of affairs.—Gorham v. Sayles, R. I., 50 Atl. Rep. 848.

164. NOTICE—Sufficient Publication.—Where notices of redemption were duly published once each week for three successive weeks, and on the day after the last publication proof of publication was made and filed, the fact that the last publication was continued for a week did not render such notice insufficient.—Cook v. John Schroeder Lumber Co., Minn., 88 N. W. Rep. 971.

165. NUISANCE—Injunction Against Nuisance Created by Plaintiff's Grantor.—One cannot abate a dam as a nuisance which was erected by reason of certain acts of plaintiff's ancestor in diverting the course of a stream on an adjoining owner.—Brittan v. Graham, Mo. App. decided at St. Louis, Jan. 29, 1902, not yet reported.

166. PARTNERSHIP—Proper Prayer for Relief.—In suit for settlement of partnership the prayer should be for judgment for whatever sum may be found due, and not for judgment for a specific sum. — Richard v. Mouton, La., 30 South. Rep. 894.

167. PAUPERS— Support of Non Resident. — Determination of a town not to support a pauper while a non-resident not communicated to the town supporting him, held no defense to an action by the town supporting the pauper, under V. S. § 3171.—Town of Topsham v. Town of Waterbury, Vt., 50 Atl. Rep. 869.

168. PERJURY—Civil Liability.—Witness in an action against a city held not liable to it for damages recovered against it by reason of his perjury.—Borough of Oakdale v. Gamble, Pa., 50 Atl. Rep. 971.

169. PERPETUITIES—Twenty One Years Without a Life in Being.—Whenever lives in being do not form any part of the time of postponement, 21 years absolute is the only period under the rule against perpetuities.—Andrews v. Lincoln, Me., 50 Atl. Rep. 598.

170. PERSONAL INJURIES—Right of Defendant to Per

sonal Examination.—Where plaintiff had been fully examined by five surgeons of defendant at different times, and there was little conflict in their evidence, there was no substantial error in overruling defendant's motion for a personal examination at the time of the trial.—Louisville & N. R. Co. v. McClain, Ky., 66 S. W. Rep. 391.

171. PLEADING—Affidavit to Put in Issue Genuineness of Signature.—Under Code, § 3279, a general replication to an answer setting up an agreement of release will not put in issue the genuineness of complainant's signature thereto, where there is no affidavit denying the signature.—Stewart v. Conrad's Admr., Va., 40 S. E. Rep. 624.

172 PLEDGES—Enforcing Security.—The holder of a promissory note held entitled to enforce security therefor, although the security was in the hands of a third party.—Perry v. Parrott, Cal., 67 Pac. Rep. 144.

173. PLEDGES—Right to Pledge Warehouse Receipts.—Warehouse receipt, not marked for hypothecation and accompanied with affidavit, as required by Acts 1876, No. 72, § 2, cannot be pledged.—Succession of Gragard, La., 30 South. Rep. 888.

174. PRINCIPAL AND AGENT—Admission of Agent.—Admission by agent will not bind principal, unless made within scope of his authority pending negotiations involved.—Callaway v. Equitable Trust Co., N. J., 50 Atl. Rep. 900.

175. PRINCIPAL AND AGENT—Authority of Agent.—Where an agent was given full control of the principal's store, with power to sell and replenish, the principal was liable for a purchase on credit contrary to his instructions.—Pacific Biscuit Co. v. Dugger, Oreg., 67 Pac. Rep. 82.

176. PRINCIPAL AND AGENT—Declaration of Agent.—The declarations of an agent are inadmissible against his principal, where made after the transaction in which the agent is authorized to act has been concluded.—Baldwin v. Central Sav. Bank, Colo., 67 Pac. Rep. 164.

177. PRINCIPAL AND AGENT—Notice to Agent.—A notice to an agent affecting the business he is to transact is notice to his principal.—Schollay v. Moffitt-West Drug Co., Colo., 67 Pac. Rep. 182.

178. PRINCIPAL AND AGENT—Ratification.—The principal's appropriation and sale of part of goods purchased by an agent without authority is not a ratification of purchase of goods at other times.—Schollay v. Moffitt-West Drug Co., Colo., 67 Pac. Rep. 182.

179. RAILROADS—Care Required in Crossing Double Tracks.—A person stopping, looking and listening before attempting to cross a double track railroad is not guilty of negligence *per se* in failing to stop, look, and listen when on or between the tracks.—Ayres v. Pittsburg, C., C. & St. L. Ry., Pa., 50 Atl. Rep. 958.

180. RAILROADS—Care Towards Trespassers.—That employees of a railway company were in the habit of crossing the tracks at a point where those on the tracks not in the discharge of duties for the company were trespassers held not to place on railroad company the duty of being constantly on the lookout for the safety of persons on the track.—Martin v. Chicago & N. W. Ry. Co., Ill., 62 N. E. Rep. 599.

181. RAILROADS—Killing Live Stock.—Where engineer negligently fails to look out for live stock near the track, the railroad company is responsible for damages resulting therefrom.—Central of Georgia Ry. Co. v. Dumas, Ala., 30 South. Rep. 867.

182. RECEIVERS—Right to Sue in Foreign State.—A receiver of one state will not be allowed to sue in another state, where the claim sought to be enforced conflicts with the rights of citizens or creditors in the latter.—Ward v. Pacific Mut. Life Ins. Co., Cal., 67 Pac. Rep. 124.

183. RECEIVERS Setting Aside Fraudulent Conveyances.—The receiver of an insolvent corporation may sue to set aside a mortgage on corporate property, which is fraudulent as to corporate creditors, though valid as to the corporation.—Curtis v. Lewis, Conn., 50 Atl. Rep. 678.

184. REFORMATION OF INSTRUMENTS—Uncorroborated Testimony.—A chancellor will refuse to reform a written instrument on the uncorroborated testimony of a single witness.—*In re* Sutch's Estate, Pa., 50 Atl. Rep. 943.

185. SALES—Failure to Exercise Option to Purchase.—That the seller, in a contract containing an option to purchase within a certain time, failed to object to conveying until advised of his rights under the contract, does not prevent him from cancelling the contract for failure of the buyer to exercise the option.—Neill v. Hitchman, Pa., 50 Atl. Rep. 987.

186. SALES—Goods Injured in Transit.—Where carrier is agent of seller, but the property sold is damaged in transit, purchaser should immediately notify seller of the damage.—Louis Werner Sawmill Co. v. Ferree, Pa., 50 Atl. Rep. 924.

187. SALES — Presumption from Prepayment of Freight.—Prepayment of freight held not to raise a conclusive presumption that the goods are to be delivered by the seller at the buyer's place of business.—Dannemiller v. Kirkpatrick, Pa., 50 Atl. Rep. 924.

188. SALES—What Constitutes a Sale. — Transaction by which seller of goods in possession of purchaser's bailee agreed to take them back in satisfaction of the purchase price held to constitute a sale.—Hendrie v. Bolthoff Mfg. Co. v. Collins, Colo., 67 Pac. Rep. 164.

189. SHERIFFS—Right to Sell Property.—Under Code Civ. Proc. §§ 547, 548, a sheriff has no authority to sell property not subject to speedy decay without an order of court.—Witherspoon v. Cross, Cal., 67 Pac. Rep. 18.

190. SHERIFFS AND CONSTABLES — Computation of Limitations for Sheriff's Liability.—Under Code Civ. Proc. § 339, requiring actions against a sheriff for the omission of an official duty to be brought within two years, the time runs from the date of the negligent act.—Lambert v. McKenzie, Cal., 67 Pac. Rep. 6.

191. TAXATION — Standing Timber.—Where standing timber is sold, the owner of the land must pay the taxes on it, and the owner of the timber on it.—Globe Lumber Co. v. Lockett, La., 30 South. Rep. 902.

192. TELEGRAPHS AND TELEPHONES — Damages for Mental Suffering.—Damages for mental suffering only because of delay in delivering telegram held not recoverable at common law or under the state statutes.—Connelly v. Western Union Tel. Co., Va., 40 S. E. Rep. 618.

193. TRADE-MARKS AND TRADE-NAMES. — Right to Combine Ordinary Trade Names. — A manufacturer of a digestive preparation cannot adopt as a trade-mark a combination of the name "pancreatin" and "pepsin," as "pancreo pepsin," and thereby prevent the use of such names or combinations thereof by manufacturers of similar preparations. — Searle & Hereth Co. v. Warner, U. S. C. C. of App. Seventh Circuit, 112 Fed. Rep. 674.

194. TRESPASS—Injunction to Prevent Trespass.—A bill to enjoin trespassers on land, which does not allege that complainant owned the land at the time the trespass was committed, nor that he was the owner of logs cut therefrom, does not show any interest to entitle him to an injunction.—Louisville & N. R. Co. v. Gibson, Fla., 31 South. Rep. 230.

195. TRIAL — Exceptions.—A general exception to a court's charge, embracing distinct legal propositions, is insufficient if any one of the propositions is proper, though sufficient if the charge is wholly bad, or contains but a single proposition.—Schollay v. Moffitt-West Drug Co., Colo., 67 Pac. Rep. 182.

196. TRIAL—Improper Remarks of Counsel.—Where the court on objection told the jury that there was no evidence of a statement made by counsel in argument and not to consider it, it was a ruling that the remark was improper, and no ground for an exception ex-

lated.—James Smith Woolen Mach. Co. v. Holden, Vt., 51 Atl. Rep. 2.

197. TROVER AND CONVERSION—Damages for Illegal Sale.—Where defendant sold cotton, which was to be held to await better prices, illegally, he is liable for the value of the cotton at the price which obtained a few months after the sale.—Succession of Gregard, La., 30 South. Rep. 889.

198. TROVER AND CONVERSION — Showing Special Property.—It is sufficient in trover, if plaintiff show right of possession with a general or special property, and he need not show absolute title.—F. A. Thomas Mach. Co. v. Voelker, R. I., 50 Atl. Rep. 538.

199. TRUSTS — Advisory Jurisdiction.—The courts of Pennsylvania have no advisory jurisdiction and a decree directing a trustee under a will to make a specific distribution will be reversed.—*In re* Morton's Estate, Pa., 50 Atl. Rep. 933.

200. TRUSTS — Enforcement of Trust for Support of Wife and Children. — Where a will creates an express trust for the support of a wife and minor children, the trust funds must be so applied by the trustee, irrespective of the father's ability to support and educate them.—National Val. Bank v. Hancock, Va., 40 S. E. Rep. 611.

201. TRUSTS—Rights of Remainder-Men.—Remainder-men under the terms of a will creating a trust fund cannot be barred during the life of the life tenant, by laches or acquiescence, from a right to invoke the aid of equity to prevent or remedy a violation of the trust.—Stewart v. Conrad's Admr., Va., 40 S. E. Rep. 624.

202. USURY—Antedating Negotiable Paper.—Where a note was antedated, so as to bear interest for nine days before the maker received the benefit of the money, but there was no evidence of any agreement that the note should be dated back to increase the rate of interest beyond that allowed by law, and the agent of the lender who transacted the business testified that in settlement of the expenses of the loan the maker allowed for the increased value of the note caused by dating back the loan, there was no evidence of usury.—Menzie v. Smith, Neb., 88 N. W. Rep. 855.

203. VENDOR AND PURCHASER—Cancellation for Failing to Exercise Option. — Failure to pay purchase money within time fixed in an option on land held not to authorize cancellation of the same.—Vankirk v. Patterson, Pa., 50 Atl. Rep. 966.

204. VENDOR AND PURCHASER—Executor Buying Surviving Partner's Interest.—An executor of a deceased partner, who, acting for himself, buys the surviving partner's interest in real estate, buys property the legal title to which is in the survivor, and is not affected with constructive notice of a deficiency in title which might attach to him as executor.—Gorham v. Sayles, R. I., 50 Atl. Rep. 848.

205. VENDOR AND PURCHASER—Lien to Secure Payment of Installments.—Where a landowner, in consideration of a contract to pay a specified sum, agrees to convey to such persons as the other party should designate, he has not a vendor's lien to secure the payment of installments of the price.—Salomon v. Martin, Colo., 67 Pac. Rep. 25.

206. VENUE—Change.—Under Code Civ. Proc. § 395, a defendant in an action against him jointly with others is not entitled to a change of venue to the place of his residence, though all the other defendants are resident.—Greenleaf v. Jack, Cal., 67 Pac. Rep. 17.

207. WASTE—Right to Restrain Waste. — Owners of land who had contracted with another for removal by him of timber held entitled to restrain waste committed by the other and one acting at his instance.—Elliott v. Bloyd, Oreg., 67 Pac. Rep. 202.

208. WATER AND WATER COURSES — Recovery of Rental for Water Furnished.—An irrigation company, in order to recover rental for water furnished under contract, must prove the contract and performance thereunder; and, where partial performance has been accepted by the lessee, any *pro tanto* recovery must be proportioned to the established benefits, after deducting damages for failure to fully perform.—Houston River Canal Co. v. Kopke, La., 31 South. Rep. 156.

209. WATERS AND WATER COURSES — Rights in Water for Mining Purposes.—One appropriating water after it passed from a placer mine, and before it passed from the premises to the creek, held to acquire rights of a licensee only, and not entitled to enjoin its pollution. — Fairplay Hydraulic Mining Co. v. Weston, Colo., 67 Pac. Rep. 160.

210. WILLS—Dower of Widow of One Dying Before Distribution.—A will construed, and held, that the title to an estate vested in the beneficiaries on the death of testatrix, so that the widow of one who died before the time for division took dower in his share.—Safe Deposit & Trust Co. of Pittsburgh v. Wood, Pa., 50 Atl. Rep. 920.

211. WILLS — Effect of Void Trust.—Will construed and held that, a trust therein being void, all of the estate devised must be treated as intestate property.—Andrews v. Lincoln, Me., 50 Atl. Rep. 898.

212. WILLS—Payment of Annuity After Death of Annuitant.—Personal representatives of annuitant under a will held entitled to the payment of the annuity after death of the annuitant.—*In re* Follett, R. I., 50 Atl. Rep. 848.

213. WILLS — Presumption as to Legacy by Debtor to Creditor.—The presumption that a legacy given by a debtor to his creditor, which is equal to or greater than the debt, is in satisfaction thereof, does not arise where the legacy is contingent, as in the case of residuary legatees, as in such case the legacy may not equal the debt.—Stewart v. Conrad's Admr., Va., 40 S. E. Rep. 624.

214. WITNESSES — Cross-Examination.—Where the subscribing witness to a note is called solely to prove its genuineness, it is irregular to permit him to be cross-examined on an issue as to its invalidity for fraud and undue influence.—*In re* Sutch's Estate, Pa., 50 Atl. Rep. 943.

215. WITNESSES—Impeachment by Former Testimony.—Where defendant testified at the preliminary examination such testimony may be introduced to contradict him or to impeach him.—People v. Chrisman, Cal., 67 Pac. Rep. 136.

216. WITNESSES—Infant Witness.—Whether a boy nine years old is competent to testify in a prosecution for murder is a question within the discretion of the court.—People v. Daily, Cal., 67 Pac. Rep. 16.

217. WITNESSES — Privilege from Incrimination.—A deponent will not be excused from answering certain questions, on the ground that the answers would criminate her, where it is not apparent from the questions how they could have that effect. Rosendale v. McNulty, R. I., 50 Atl. Rep. 850.

218. WITNESSES—Producing Books of Account.—A person cannot be compelled to produce books of account kept by him in the conduct of his business, for use as evidence against him in a criminal prosecution, without being compelled to give evidence against himself, in violation of Const. U. S. Amends. 4, 5, and Bill of Rights Md. art. 22.—Blum v. State, Md., 51 Atl. Rep. 26.

219. WITNESSES—Proof of Importance of Witness by Showing What He Would Testify.—In an action under Code Civ. Proc. § 1992, a complaint which does not show that the defendant, who disobeyed a subpœna, could have given testimony material to the issues, states no cause of action.—Nolan v. Grider, Cal., 67 Pac. Rep. 9.

220. WITNESSES—Right to Explain Former Testimony.—Where evidence of a party's testimony at a former trial was introduced, it was error not to allow such party to explain what he meant by such testimony.—Acklin v. McCalmont Oil Co., Pa., 50 Atl. Rep. 955.